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Cape of Good Hope Supreme Court. 625

REPORTS OF ALL CASES

DECIDED



IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE

DURING THE MONTHS OF JANUARY, FEBRUARY, AND
MARCH, 1893.

(WITH TABLE OF CASES AND DIGEST.)

REPORTED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE
SUPREME COURT, CAPE OF GOOD HOPE.

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SUPREME COURT.

(IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, { 1898.
K.C.M.G. (Chief Justice), Mr. {
Justice BUCHANAN, and Mr. { Jan. 4th.
Justice UPINGTON, K.C.M.G.]

ADMISSION.

Ex parte FULLER.

On the motion of Mr. Searle, Mr. Andrew Chatterton Fuller was admitted to practise as an attorney and notary, the oaths to be taken at King William's Town.

Ex parte DU FLESSIS AND SCHULTZ.

On the motion of Mr. Joubert, the award of the arbitrators in the matters in dispute between the parties was made a rule of Court.

BOOS V. RESIDENT MAGISTRATE OF { 1898.
CALEDON. { Jan. 4th.

Evidence — Law-agent — Misconduct — Removal from list of enrolled agents—Act 20 of 1856, section 37—Review.

R., a law-agent practising in the Resident Magistrate's Court for Caledon, was summoned on the 24th December, 1892, to show cause why his name should not be absolutely removed from the list of enrolled agents practising before that Court, on the grounds of his having in 1890 been convicted of fraud in the Transvaal, and sentenced to two years' imprisonment with hard labour.

At the hearing of the case a letter, purporting to have been written by the Assistant Registrar of the High Court, Pretoria, and enclosing a copy of the indictment upon which *R.* was convicted, and detailing the circumstances of his conviction and the

subsequent quashing of the conviction, was read as evidence against *R.*

No certified copy of the record of the trial in the Transvaal was produced—the indictment was not certified, the Assistant Registrar's letter did not bear the seal of the High Court, nor was there any proof before the Court that the writer was the Assistant Registrar of the High Court.

R. recused the Magistrate on the grounds of animus, and objected to the proceedings as being inter alia informal, and refused to answer any questions.

R.'s name was ordered to be struck off the list.

Held, on review under Act 20 of 1856, section 37, that there was sufficient prima-facie evidence before the Resident Magistrate to justify him in calling upon *R.* to show cause, and that *R.*'s name had been properly struck off the list of enrolled agents.

This matter came up for review under Act 20 of 1856, section 37.

The applicant, a law agent practising before the Resident Magistrate's Court for Caledon, was summoned on the 24th December, 1892, "to show cause why his name should not be absolutely removed from the list of enrolled agents practising in the Court of the Resident Magistrate for Caledon, by reason of his having been found guilty of the crime of fraud at the Circuit Court at Zoutpansberg, or Pietersburg, in the South African Republic, during May, 1890, and sentenced by Mr. Justice Ameshoff to two years' imprisonment with hard labour, for the said crime, thereby rendering himself an improper and unfit person to remain on the list of enrolled agents of the said Court."

The defendant, through his agent, recused the presiding Magistrate on the grounds of animus, inasmuch as the defendant averred that the facts alleged in the summons, although not admitted by the defendant to be true, were well known to the said Magistrate some four months ago and more, and with that knowledge he nevertheless permitted the defendant to practise as an agent of

his Court up to now, and also during such period certified to defendant's being an enrolled agent of his Court, upon which certificate defendant was also admitted to practise as an agent in the Resident Magistrate's Court, Bredasdorp.

That the defendant had lately been instructed by one Fonrie to institute proceedings against the said presiding Magistrate for £500 damages for slander, which fact defendant believed was well known to the said Magistrate, and hence averred that the said Magistrate was actuated by sheer malice.

The case was ordered to proceed.

The defendant then excepted to the summons : (1) On the ground that the time laid down in section 10, schedule B, Act 20 of 1856, for service of same was not observed in this case, in that the summons was served at five p.m. on the 22nd instant, instead of before ten a.m. on that date, and that defendant therefore had not the forty-eight hours' notice to which he was entitled ; (2) on the ground of its being vague and insufficient, in that no complainant was mentioned therein. These exceptions were overruled, and as a plea to the summons, the defendant denied the allegations of fact and conclusions of law set forth in the summons.

The case was then proceeded with, but the defendant objected to the Resident Magistrate presiding, on the grounds that a telegram had been received appointing the Assistant Resident Magistrate to act as Resident Magistrate for the day.

This objection was overruled, and the Court adjourned until two p.m., at which hour a telegram from the Colonial Secretary was read cancelling the appointment of the Assistant Resident Magistrate to act for the day. A letter purporting to be from the Assistant Registrar, High Court, Pretoria (Mr. Meintjes), dated September 28, 1892, forwarding a copy of the indictment against the defendant for fraud, and detailing the circumstances of his conviction and subsequent acquittal, was then read in court. (From this letter it appeared that one John Abraham, or Anthony Roos was convicted of fraud at the Circuit Court held at Zoutpansberg in May, 1890, and that the conviction was subsequently quashed by the High Court on the grounds of short service.)

The defendant denied the right of the Magistrate to make any inquiry into the matter on the loose grounds set forth by the Magistrate, and alleged that he considered all the proceedings informal, and declined to answer anything until called upon by a proper tribunal, when, he alleged, he would be prepared to defend himself. Upon the defendant failing to show cause, it was ordered that his name be struck off the list of enrolled agents practising in the Court of the Resident Magistrate for Oledon.

From that order the present application for review of the proceedings was brought.

Mr. Searle appeared in support of the application.

Mr. Rose-Innes, Q.C. (Attorney-General), informed the Court that notice of the application had been served on him, but that he had not been instructed to appear for the Magistrate, nor did it appear that the Magistrate had had notice of the present proceedings ; under section 87 of the Act the Magistrate was bound to transmit a certified record of the evidence.

Mr. Searle explained that the attorneys for the applicant regarded the present proceedings as in the nature of a criminal review, and gave the Attorney-General the notice required by section 49 of the Act. There was nothing in the 87th section which required notice to be given to the Magistrate.

The Attorney-General having expressed his willingness to appear for the Magistrate, the application was heard.

Mr. Searle contended that the proceedings in the Magistrate's Court were quite irregular. The Magistrate had no legal evidence to go upon. There was no proper proof of the alleged proceedings in the Transvaal, no record was forwarded, nor was there a certified copy of the indictment. Again, there was no evidence as to who Mr. Meintjes was, or whether he was the Assistant Registrar of the High Court. No Court would admit such evidence of a foreign judgment, and the Magistrate had no right to do so. The conviction of the Roos referred to in the indictment had been quashed by a full bench, and if the State had thought they could have obtained a conviction, he would have been tried again if he had not been in jeopardy at his first trial. Roos was justified in objecting to the entire proceedings. Further, he had not received the forty eight hours' notice to which he was entitled. A fresh inquiry should be instituted, and Mr. Roos afforded an opportunity of explaining the proceedings in the Transvaal. It was true that Roos's name had on a previous occasion (March, 1887) been removed from the list for twelve months, after which he resumed practice. The important point to be observed in the present instance was that the man was actually acquitted, and that being so, there was no stain on his character. A proper investigation must take place, for upon the meagre information now before the Court Mr. Roos could not be deprived of his means of livelihood.

The Attorney-General was not called upon.

The Chief Justice, in delivering judgment, said : Under the 87th section of Act 20 of 1856 every Magistrate's Court possesses and exercises over and in respect of all agents so enrolled the like powers and authorities as the Supreme Court possesses and exercises over or in respect of the attorneys thereof, and may summarily inquire into

any charge of misconduct preferred against any agent, and so on. Now one of the objections taken to the Magistrate's course of procedure in the present case was that the forty-eight hours notice was not given—that the summons was not served upon appellant forty-eight hours before this matter was heard. There was nothing in the section requiring that forty-eight hours' notice should be given. The Act said that the Magistrate might summarily inquire into the charge, and in this case there was sufficient notice given to the appellant to enable him to prepare his defence. The more serious objection was whether there was sufficient *prima-facie* evidence to justify the Magistrate in calling upon the agent to show cause why he should not be struck off the list. The Magistrate had received a letter from the Assistant Registrar of the High Court of Pretoria, and that letter enclosed a copy of the indictment against Roos for having committed the crime of fraud, and the letter further stated that he was found guilty and sentenced to two years' imprisonment with hard labour. There was an exception of short service reserved for argument before the High Court, and upon that exception the prisoner was discharged. In my opinion this was sufficient legal proof to justify the Magistrate in calling upon the defendant to show cause why he should not be struck off the roll. If by reason of short service he was unable to make his defence, it was competent for him to state it. The Magistrate gave him every opportunity of answering the charge, but instead of doing that, he himself charged the Magistrate with animus and bias in calling upon him to show cause. Now, that was not the proper course for him to adopt. Even now, when he appealed to this Court, he did not say that he had any good defence upon the merits, but he relied entirely upon technicalities. A higher court would be quite justified in striking his name off the list of practitioners. He had been sentenced to two years for fraud, and the only exception taken to the conviction was that of short service, and upon that he was discharged. I therefore think that this appeal ought not to be allowed, nor could they lose sight of the fact that he had been struck off the roll before. The matter was before the Court judicially. The Court saw that there was ground for striking him off the roll, but as he was a young man they thought it right to give him another opportunity of reforming, but instead of taking advantage of this opportunity it seemed that in the Transvaal he had been found guilty of an offence even worse. Under all these circumstances, it would be carrying indulgence too far to reinstate Mr. Roos.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT.

(IN CHAMBERS.)

[Before Mr. Justice BUCHANAN, { 1898.
and Mr. Justice UPINGTON, { Jan. 10th.
K.C.M.G.]

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE HENRY R. LOVEMORE.

Mr. Tredgold moved for authority to the widow, in her capacity as executrix of the said estate, to pass a second mortgage bond on certain farm known as Preston Park, in the district of Uitenhage, to satisfy a claim due to one of the sons of the said Lovemore. Under the will of the deceased his widow enjoys a life interest in the property, which, however, she is prevented from selling or mortgaging, and which after her death is to pass to four sons of the marriage, who are now all majors, and who consented to the present application being granted.

The Court granted the authority asked for.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

In re SCHOEMAN. { 1892.
Dec. 15th
1893.
Jan. 12th

Executor — Letters of administration —
Domicile—Absence from Colony—Security
—Removal of executor.

Letters of administration should not be granted by the Master of the Supreme Court to any person who is absent from the Colony at the time of applying for the same.

An executor testamentary who is not only domiciled in the Colony but is actually here at the time of applying for letters of administration is entitled to obtain the same without any conditions.

If an executor testamentary is not domiciled here, but comes here for the purpose of

applying for letters of administration, the Master should grant the same unconditionally if he is satisfied that such executor will reside within the jurisdiction until he has fully administered the testator's estate.

If, however, the Master is not so satisfied he ought to require security for the due administration of such estate.

When once letters of administration have been granted to any executor whether testamentary, dative or assumed, he will not be removed from office owing to temporary absence from the Colony if he is willing to remain in office, in the absence of proof that duties requiring performance have been left unperformed, or that some act of administration which cannot be done without his presence requires to be immediately done.

Upon a petition by persons appointed by will as executors together with a person resident in the Transvaal to restrain the Master from granting him letters of administration, the Court directed that, if such non-resident should apply in person, the Master should judge whether it is a case in which letters should be granted unconditionally or on condition of proper security being given, and that, if the applicant should not come into the Colony at all for the purpose of his application, the Master should refuse to grant him letters.

Mr. Searle appeared on the 15th December last for the petitioners, and asked for an order restraining the Master from granting letters of administration to one of the executors of the said estate (Mr. Matthys Johannes Lourens) until he should have entered into a security bond to the Master for the due performance of the trust, he being resident in the South African Republic.

The petitioners John Cairncross and Philip Rudolph Botha Schoeman were, together with Arabella Elisabeth Schoeman, Matthys Johannes Lourens, and Thomas Henry Parker Kampf, appointed executors testamentary by the will, dated 24th February, 1892, of the late Johan Ooenraad Schoeman and his surviving spouse, the above-mentioned Arabella Elisabeth Schoeman.

Letters of administration were granted to the petitioners and Mrs. Schoeman by the Master on the 12th July, 1892.

All the executors above mentioned reside in the Colony, except M. J. Lourens, who resides at

Klerkedorp in the South African Republic, and thus outside the jurisdiction of the Court.

Lourens recently applied for letters of administration.

The petitioners submitted that the appointment of an executor not resident within the jurisdiction of the Court was not desirable, nor in the interests of the estate, as it necessitated unnecessary delay and expense in referring matters connected with the working of an estate to such a non-resident executor, and they asked that if letters of administration were granted to Lourens he should be obliged to find security in accordance with the practice existing before the decision in Von Pentz's case (2 C.T.L.R., 65).

The Master's report was in the following terms:

In view of the decision "In the Matter of the Estate of Von Pentz" (2 C.T.L.R., 65), the Master is bound to grant letters of administration in this case unless authorized by the Court to refrain from doing so.

The practice of this office prior to that decision was explained to the Court, and it need not therefore now be recapitulated. I can only, with all respect, bring to the notice of the Court that when letters of administration are issued unconditionally to executors not resident in the Colony some very important requirements of the law are rendered nugatory, it being, for instance, virtually impracticable for the Master to carry out the provisions of Acts 14 of 1864, 11 of 1878, and 5 of 1884 in respect of such executors.

The present case is distinguishable from that of Von Pentz by the fact that in the latter the executor was also the sole heir.

Mr. Searle was heard in support of the application, and contended that the case of Von Pentz (2 C.T.L.R., 65) could not be regarded as settling the practice, as there were exceptional circumstances in that case. The previous practice had been to require security, and should be restored.

The Attorney-General was heard on behalf of the Master, who submitted to the judgment of the Court.

Judgment, which was reserved, was delivered this morning.

The Chief Justice said: The petitioners who by will have been appointed executors, together with M. J. Lourens, of J. C. Schoeman's estate, seek to restrain the Master of the Supreme Court from granting letters of administration to Lourens until he shall have given security for the due and faithful administration of the estate. The ground of the application is that Lourens resides in the South African Republic and not within the jurisdiction of this Court. During the argument the further fact has been relied upon that Lourens has not come within the jurisdiction at all for the purpose of obtaining letters of administration. This fact appears to me to be fatal to his right of

obtaining letters, but, as he may still come to the Colony for the purpose, it will be necessary to lay down some rules for the guidance of the Master in case Leurens should apply in person. The decision of this Court in the recent cases of "*In re Von Pentz*" and "*In re Moodie*" affords no assistance for the determination of the present case. In each of these cases the non-resident executor had come to the Colony for the purpose not only of obtaining letters, but also of administering the estate. In neither of the cases was there anything to show that the late Master entertained any apprehension as to the executors not remaining in this colony until they had fully administered the respective estates. On the contrary, in both these cases, as I have been informed by the present Master, there was every reason to believe that the executors would personally perform their duties within the Colony. It was only in deference to the previous practice of his office that the Master insisted upon security before granting letters of administration. We have now to deal with a case in which the executor is non-resident, and there is no reason for believing that he will personally administer the estate under the supervision of the Master. Where letters of administration have once been granted to an executor, his mere absence from the Colony is not a sufficient ground for removing him from office. Temporary absence may be quite consistent with the executor's perfect capacity and willingness to perform his duties. Accordingly, in the case of "*Grobbelaar's Trustee v. Grobbelaar's Executors*" (Buch. 1879, p. 207), the Court refused to remove an executor without some proof that his absence was of such a nature or duration as to amount to refusal or unwillingness to act. But where, as in *Esterhuyzen's case* (4 Buch. for 1874, p. 1), the executor was absent under circumstances which were inconsistent with the proper performance of his duties, the Court without hesitation removed him from his trust. The rule may be briefly stated that an executor, whether testamentary or dative or assumed, who is temporarily absent from the Colony and who is willing to remain in office, will not be removed in the absence of proof that duties requiring performance have been left unperformed, or that some act of administration which cannot be done without his presence requires to be immediately done. The case of an absent person applying for letters of administration stands on a different footing. From the nature of the case his duties were still entirely unperformed. Either he intends to commence their performance at once or he intends to postpone it. In the former event he ought to be here personally, and if he is not, letters ought not to be granted to him. In the latter event there is no occasion for granting him letters of administration until he is prepared to act upon them. It follows, therefore, that letters

of administration should not be granted by the Master to any person who is absent from the Colony at the time when he applies for them. But other cases may arise where the person applying for letters as executor testamentary happens then to be in the Colony, but ordinarily resides outside the Colony. In such cases letters of administration should be granted, but it must, in my opinion, be left to the discretion of the Master whether he will do so unconditionally or upon certain conditions. If he is satisfied as to the *bona-fide* intention and ability of the applicant to reside in the Colony until the estate shall have been fully administered, there is no reason why letters should not be granted unconditionally. But if the Master honestly believes that he will lose all control over the administration when once letters have been granted he ought surely to have the power to impose such conditions as will reserve such control to him. Among the duties of the Master the most important are those of calling upon all executors to file proper accounts, and of collecting succession duty from executors, but neither of these duties could be efficiently performed in regard to executors who are absent, and on whom he has no hold whatever. An effectual way of retaining control over the administration would be by granting letters on condition of security being given for due administration, and until the decision in the recent cases of "*In re Von Pentz's Estate*" and "*In re Moodie's Estate*," that has been the course actually adopted in all cases of non-resident applicants. After that decision he can no longer refuse to grant letters to persons who apply to him personally, and as to whom he is satisfied that, although not permanently domiciled here, they will reside within the jurisdiction until they have completed their administration. But where he is not so satisfied he will, in my opinion, be justified in continuing the wholesome practice of requiring security. If the applicant is unable or unwilling to give security, but is authorised by the testator's deed or will to assume another person as executor, the difficulty might be met by such assumption, but the assumed executor would be bound by the 24th section of Ordinance No. 104 to give security. Failing such assumption, the only course left to the Master would be to appoint an executor dative in the usual way. In the present case the person objected to by the petitioners is not only a non-resident, but it does not even appear that he intends to come into the Colony from the Transvaal for the purpose either of obtaining letters of administration or of administering Schoeman's estate. The petitioners apply for an order restraining the Master from granting him letters, but it would be premature to make such an order. If Leurens should apply in person, the Master

will judge whether it is a case in which letters should be granted unconditionally, or on condition of proper security being given. If Lourens should not come into the Colony at all, the Master will of course refuse to grant him letters of administration. The cost of the present application may fairly come out of Scheeman's estate.

Mr. Justice Buchanan said: When the cases of Von Pentz and Moodie were before the Court the late Master stated that the practice had been changed in 1864. Before 1864 the late Master informed the Court that the practice of the office had been not to grant letters of administration at all to absent executors testamentary but that their agent was usually appointed executor dative. Since 1864 the practice changed, and the Master granted letters of administration to absent executors, upon their finding security. In Moodie's case, the executors came to the Colony and presented themselves to the Master and applied for letters. The Court held that the Master was not justified in requiring security, and his lordship thought, rightly so. Unless a person was domiciled here, the Master might inquire into his ability to administer the estate. The Master might be satisfied in simply requiring a *domicilium citandi et executandi*. That was a matter which was left to the decision of the Master. Practically, the decision of the Court reverted back to the practice of the Master's Office before 1864.

[Petitioners' Attorney, D. Tennant, jun.]

PROVISIONAL ROLL.

STURGIS V. STIGANT. { 1893.
JAN. 12th.

Mr. Tredgold moved for provisional sentence on a promissory note for £17. The original amount was for £22, £5 of which had been paid.

The Court granted provisional sentence, with Magistrate's Court costs only.

MCKILLOP AND OTHERS V. JAMES EDWARD MEARS.

Mr. Buchanan moved for the final adjudication of the defendant's estate.
Granted.

ROBERTS V. PETRIE.

Mr. Webber moved for provisional sentence for £209, upon an acknowledgment of debt.
Granted.

TWYCBROSS V. EVANS.

Mr. Juta applied for confirmation of the writ of arrest. Defendant had given bail.
Granted.

BLAKE V. VAN ROOYEN.

Mr. Juta moved for provisional sentence for £12 18s. 6d., with interest from 6th June, 1892, upon a promissory note of £14 17s, the balance having been paid.

Granted.

LEWIS V. AMELER.

Mr. Sheil moved for provisional sentence for £70, with interest from 14th December, 1892.

Granted.

HAYWARD V. GONGLE.

Mr. Watermeyer moved for provisional sentence for £18 16s. 8d.

Granted.

PAARL FIRE ASSURANCE V. VAN DER MERWE.

Mr. Molteno moved for provisional sentence on a bond for £600. The bond had become due by reason of non-payment of interest.

Granted.

SMITH V. MURRAY.

Mr. McLachlan moved for judgment under rule 819 for £880 12s. 1d.

Granted.

BEKE AND CO. V. LOUBSER.

Mr. Jones moved under rule 829 for judgment for £18, the balance of account for goods sold and delivered.

Granted.

BRUCE V. KEYTER.

Mr. Jones moved under rule 829 for judgment for £15.

Granted.

STIGANT'S EXECUTORS V. STIGANT.

Mr. Jones moved under rule 829 for judgment for £465 10s. 1d., being the balance of account.
Granted.

REHABILITATIONS.

On motion from the bar, the following insolvents were granted their rehabilitations: Willem Petrus Johannes van Wyk, Richard Pavitt, John James Kelly, Robert Emslie, Thomas T. Hoole, Henry W. Maan, and Daniel J. Russouw, jun.

GENERAL MOTIONS.

MUSGROVE V. MUSGROVE.

Mr. Molteno asked the Court to make absolute the rule nisi for dissolution of the marriage subsisting between the parties, and giving the custody of the child to the mother, by reason of respondent's failure to obey the order for restitution to his wife of conjugal rights. The order for restitution of conjugal rights was granted on 21st November last. Personal service had not been effected, but publication was made in the Transvaal papers.

The Court made the rule nisi absolute.

Ex parte MELLE AND WIFE. { 1898.
Jan. 12th.

Ante-nuptial contract—Appointment of new trustee—No order.

Mr. Sheil moved for the appointment of a new trustee to the ante-nuptial contract entered into between the petitioners, the present trustee wishing to resign, and the contracting parties having agreed upon a successor.

This was the petition of George James McCarthy Melle and Annie Elizabeth Susan Melle (born Van Niekerk), who on the 16th December, 1889, entered into an ante-nuptial contract, which was duly registered in the Deeds Office of the Colony.

In terms of this contract two policies of life assurance, effected on the life of the first-named petitioner, were settled on William Frederick Stamper as trustee, subject to the conditions set forth in the contract.

The trustee was now anxious to be relieved of the trusteeship, and to have another trustee appointed in his place.

The petitioners were willing to relieve the trustee, and were desirous of appointing in his place Charles Christian Alexander de Villiers, of the Paarl.

They now asked the Court to grant an order, appointing Charles Christian Alexander de Villiers as trustee under the said contract, and discharging the said William Frederick Stamper from his trusteeship.

In the contract the petitioners reserved to

themselves the power at any time, on the demise or resignation of the trustee, to nominate and appoint any other person as trustee by separate act under their signatures.

The Court made no order, as there were no special circumstances in the present case, as there had been in *Hopley's case*, calling for the approval of the Court.

[Petitioners' Attorneys, Messrs. Van Zyl & Buissandé.]

ZURING V. ZURING AND DICKER. { 1898.
Jan. 12th.

Mr. Tredgold asked the Court to make absolute the rule nisi admitting applicant to sue in *forma pauperis* in an action against his wife for divorce by reason of her alleged adultery, and for damages against the second-named respondent.

The Court made the order.

IN THE MATTER OF WALTER H. SCHOLEFIELD.

Mr. Searle moved for authority to the trustee under the ante-nuptial contract of the said Scholefield and Constance Holland to raise a sum of money, on security of a life policy settled by the said contract, for the purpose of defraying part of the purchase price of landed property bought by the second-named contracting party.

The Chief Justice said some other security for the purchase price of the property must be found. The interests of the minors must be left intact. The applicant might produce some other scheme, by which the interests of the minors might be protected. At present the application must be refused.

WATERMEYER'S EXECUTRIX V. { 1898.
WATERMEYER. { Jan. 12th.

Pauper—Application for leave to sue—125th Rule of Court—Rule nisi discharged.

Mr. Schreiner, Q.C. (with him Mr. Webber), moved to make absolute the rule nisi admitting plaintiff to sue in *forma pauperis* in an action against the respondent in respect of certain moneys in the estate alleged to have been received, but not paid over.

Mr. Molteno appeared for the respondent, and read his and other affidavits, from which it appeared that the applicant had a life interest in two water erven, situate in the village of Hanover, which yielded a rental of £8 per month, and which life interest was valued at at

* In *Hopley's Case* minors were interested and the father himself applied to be appointed new trustee.—Ed.

least £75. Having this property, the respondent alleged that the applicant was not a pauper within the 125th Rule of Court.

The applicant, in her answering affidavit, alleged that she regarded the erven in question as the property of her four minor children, on whose maintenance and education the rent was spent; further, that she could not support herself and her children without the assistance of her father and brother.

Mr. Schreiner, Q.C., was heard in support of the application, and contended that the applicant had not property to the amount of £10 in value in possession within the meaning of the rule of Court. If applicant were not allowed to sue as a pauper she could not afford to bring her action.

The Chief Justice said if the facts now alleged had been brought to the notice of the Court on the original application, the rule would never have been granted. The Court must now discharge the rule.

CLAYTON, N.O., V. METROPOLITAN { 1898.
& SUBURBAN RAILWAY CO. { Jan. 12th
& 24th.

Railway—Expropriation—Mala fides—Interdict—Alienation of expropriated land—Transfer.

By agreement between a Railway Company and a contractor it was stipulated that the Company should secure as much land as could be acquired under its Act and transfer to the contractor or his order, upon the completion of the contract, all land not actually to be used by the Company.

In pursuance of this stipulation the contractor, as the Company's agent, acquired more land from the War Department than was actually required for railway purposes and, according to the evidence given for the War Department, undertook with the department that if the Act should be passed only buildings which are easily removable would be erected on the land.

The deed of transfer of the land to the Company recited that the land had been expropriated for railway purposes but contained no condition that the land was not to be alienated.

Upon the completion of the railway, the Company proposed to transfer portion of the land to the contractor.

Held, that as there was prima-facie evidence that the expropriation of such portion had

been made for sinister and ulterior purposes the War Department was entitled to an interdict restraining the transfer with leave to the contractor to apply to set it aside.

The Company also proposed to transfer another portion of the land to a purchaser, alleging that it had been sold in order to enable the payment of a loan which had previously been raised on mortgage of the land for the purpose of paying the compensation awarded by arbitrators to the Department in respect of the expropriation of the land.

Held, that the question whether the transfer should be interdicted must be tried by action to which the purchaser and the mortgagees should be parties, but pending such an action and in the absence of proof that the purchaser would be prejudiced by the delay, the Court granted a temporary interdict restraining the transfer.

On the 21st November last Mr. Innes, Q.C. (Attorney-General), moved to make absolute the rule nisi granted on the 13th November, and which operated as an interdict, restraining the respondent company and the Registrar of Deeds from passing transfer of certain land near the Amsterdam Battery, formerly belonging to the War Department, and expropriated for railway purposes only, in terms of deed of transfer to the said company.

The rule was extended to the last day of term and on the 19th December the interdict was continued by consent until to-day.

The facts, upon which the rule was granted, were set forth in the affidavit of Colonel Valentine Gardner Clayton, commanding the Royal Engineers, and as such representing Her Majesty's Secretary of State for War in this Colony, were as follows:

On the 17th January, 1891, transfer was passed from the War Department to the respondent company of certain land behind the Amsterdam Battery, which land had been expropriated for railway purposes.

At the time the rule nisi was applied for the respondent company were about to transfer portion of such land to one William Alfred Philip to whom they had sold it for £1,500 and another portion to John Walker (the contractor) by virtue of an agreement between the latter and the company.

Colonel Clayton alleged that the land had been expropriated for railway purposes only, and not to

be transferred to private individuals, and that it would be highly detrimental to the interests of the War Department in this country if transfer of this land were allowed to be passed to private individuals and highly prejudicial to the defence of Cape Town, the land in question being situated to the rear of the Amsterdam Battery.

The contractor (John Walker), in his affidavit in answer to the above, alleged *inter alia* that the original intention of the respondent company was to expropriate only a portion of the land in question, but that when this was intimated to Colonel Philips, the then Colonel Commanding the Royal Engineers, he found that the effect of expropriating this portion of the land would be to cut off the Amsterdam Battery from the remaining portion thereof and thus render it useless for the War Department purposes.

That he (Colonel Philips) brought this to the notice of the company and urged it to expropriate the whole extent.

That finding that the land could be used for railway purposes it was expropriated, and a sum of £1,200 (awarded by arbitrators) paid for it to the War Department.

That in order to raise the money to pay the amount of compensation awarded by the arbitrators, transfer duty, and costs of transfer, the company was obliged to mortgage the said land to the extent of £1,250.

That the mortgagee had called up his bond and it was for the purpose of paying him off that portion of the land was sold to Mr. Philip.

It was further alleged upon affidavit on behalf of the applicant that no objections were raised in Parliament to the passing of the company's Bill (23 of 1889) on the distinct understanding that the buildings to be erected on the expropriated land were to be of a light structure, easily removable, and to be removed if the War Department required it, and that the company was to pay a substantial acknowledgment in recognition of their permissive tenure.

The clauses of the agreement entered into between the contractor (Walker) and the company, dated 20th November, 1889, and having reference to the land to be expropriated were as follows:

1. *The company shall pay the balance owing on the contract price as a first charge in mortgage bonds or debentures of £100 each and shall then also transfer and make over to the contractor (Walker) or his order all the company's rights over or to any lands at their disposal not required for the actual working of the railway.*

2. *The company agrees to secure as much land as can be acquired under the company's Act, and to transfer to the contractor (Walker), or his order, upon the completion of the contract, all land not actually to be used by the company.*

3. *If more than £750 be required for land to be bought for expropriation purposes the contractor (Walker) shall pay at his own personal costs and charges such sum or sums required over and above the sum of £750, he being entitled to transfer of the excess of land as aforesaid.*

Mr. Rose-Innes, Q.C. (Attorney-General), was now heard in support of the rule. Act 23 of 1889, section 6 gives, the company the same powers as Act 9 of 1858 bestowed upon the Commissioners of Roads. (See also Act 40 of 1889, section 144.)

It is clear from section 6, sub-section (a), that only land absolutely necessary for railway purposes can be expropriated.

If land is taken under colour of the Act in order to sell it, as in the present case, the taking is illegal.

The agreement between the company and Walker amounted to a fraud on the owners of the land for the benefit of Walker.

The rule should be made absolute.

He cited the following cases in argument: "Landmark v. Van der Walt" (8 Juta, 800) "Stockton and Darlington Railway Co. v. Brown, and Others" (6 Jur. N.S., 1,168; 9 H. of L, 246), "McDonald v. District Engineer, M. & N.E. Railway" (7 Juta, 290), "Dowling v. Pontypool, Caerleon and Newport Railway Co.," (18 L.R. Eq., 714.)

Mr. Juta for the respondent company contended that unless the applicant could show that the acquisition of the land was not *bona fide*, but was made with a sinister and ulterior motive, then he had no right to proceed against the respondent company either to have the title deeds amended or to have the interdict continued.

The Attorney-General in reply.

Cum ad vult.

Postea (January 24.)

The Court delivered judgment.

The Chief Justice said: The question does not arise in the present case whether, in case the Sea Point Railway Company should at any time be abandoned as such, the respondent company will retain any rights in respect of the land expropriated for railway purposes. The question is whether the respondent company should be restrained, while their railway is a going concern, from alienating any portion of the land expropriated to persons who admittedly intend to use such land for their own private purposes.

The applicant, as representing the Imperial War Department, alleges that the efficiency of certain forts for defensive purposes would be seriously impaired if private buildings were erected upon any portion of the land in question, and that the private Act authorising the construction of the railway would have been opposed

had not the company undertaken to erect only buildings that are easily removed upon the land. It is argued that this undertaking given to the applicant's predecessor in office clearly implied that the land would not be alienated for ordinary building purposes. A distinction must be drawn between the land proposed to be transferred to Mr. Walker and the land proposed to be transferred to Mr. Philip.

As to Mr. Walker, one of the applicant's affidavits alleges that, as contractor with the Company for the construction of the railway, he stipulated for personal advantages to himself which are quite inconsistent with a *bona-fide* intention of expropriating the land for railway purposes.

The company agreed to secure as much land as could be acquired under the Act and to transfer to him or his order, upon the completion of the contract, all land not actually to be used by the company.

It is in pursuance of this contract that the company now propose to transfer some of the land to Mr. Walker. As soon as the railway is completed the company makes the discovery that the land is no longer required for railway purposes and proposes to transfer it to the man who has been acting throughout as its agent in acquiring the land.

Prima facie the acquisition of this land appears to me to have been made for sinister and ulterior purposes, and sufficient ground exists according to the views expressed in *Lan dmark v. Van der Walt* (8 Juta, 800) for restraining the transfer.

The fact that the company has obtained unconditional transfers of the land ought not to stand in the way of such an interdict. Neither the company nor Mr. Walker ought to be allowed to take the benefit of a transaction which is tainted by such an utter want of good faith as is disclosed by the affidavits. The interdict will not, however, be perpetual, so that it will be competent for Mr. Walker, on good cause shown, to move to have it set aside.

The proposed transfer to Mr. Philip stands on a different footing. If there were any reason to believe that a delay in the passing of transfer to him would prejudice him the Court would not even grant a temporary interdict restraining the transfer.

In the case of *Green and Sea Point Municipality v. Metropolitan Railway Company* (8 Juta, 61), the Court refused an interdict to restrain the construction of a railway except in accordance with the terms of a private agreement differing from the terms of the Act. The grounds of the refusal were that such an interdict might injure others who would have objected to the Bill if it had incorporated the private agreement, and that damages would be sufficient compensation for the

breach of the agreement. In the present case, however, damages would be no compensation to the War Department if the proposed transfer to Philip should really be prejudicial to the defence of the town.

The applicant is anxious to have the question tried by action and, as no serious injury can result to Mr. Philip from a short delay, we are of opinion that a temporary interdict should be granted to enable the applicant to bring his action during the ensuing term. To such an action Philip and the mortgagee, to whom the land is alleged to have been mortgaged to raise the money required to pay the compensation in respect of the expropriation, must be parties.

In granting this interdict the Court must be clearly understood as not expressing any opinion upon the merits of the case. If Philip was no party to any breach of faith, and bought the land upon the faith of its being duly registered in the name of the company, legal considerations might arise which would not be affected by the possible prejudice to the defences of the town or by the undertaking given to the War Department by the company.

The Court will grant an interdict restraining the respondents from transferring any portion of the land in question to John Walker, with leave to the said Walker to apply to set the same aside. The Court will further continue the interdict restraining transfer to William Alfred Philip until the 28th February next.

The respondents must pay the costs of this application.

Their lordships concurred.

[Attorneys for the War Department, Messrs. Van Zyl & Buissinne; Attorneys for the Company, Messrs. Wessels & Standen.]

DE BOT V. DE BOT. { 1898.
{ Jan. 12th.

Mr. Buchanan moved for leave to petitioner to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his desertion.

The Court granted leave to sue defendant by edictal citation, personal service if possible, failing which one publication in the *Johannesburg Star*, the citation to be returnable on 28th February next.

LARY V. LARY.

Mr. Molteno moved for a rule requiring petitioner's husband to show cause why she should not be admitted to sue him *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce.

The Court granted a rule nisi, returnable on

16th February; personal service to be effected, failing which one publication in the Johannesburg Star.

IN THE MATTER OF THE MINOR HERBERT L. DYER.

Mr. Tredgold moved for leave to the general agent of the minor's father to give transfer to the purchaser of certain block of ground situated in King William's Town, the property of the minor, the same having been sold, and it being proposed to pay the proceeds into the Guardians' Fund.

The Court made the order on condition that the money be paid into the Guardians' Fund.

SNYMAN V. SNYMAN.

Mr. Tredgold moved for leave to sue *in forma pauperis* in an action against petitioner's husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

The matter was referred to Mr. Juta.

KEENAN V. KEENAN.

Mr. Sheil moved for leave to sue *in forma pauperis* in an action against petitioner's husband for restitution of conjugal rights, failing which for divorce.

Referred to counsel.

Ex parte DU PLOOY. } 1893.
Jan. 12th.

Pauper suit—Reference to counsel—Appeal *in forma pauperis*—Defamation.

Where, upon the face of an application for leave to sue or defend in forma pauperis, it is clear to the Court that there is no cause of action or defence, no reference will be made to counsel.

Appeals from Circuit Courts may be instituted in forma pauperis, but the fact that judgment has been given against the petitioner would justify the Supreme Court in looking more closely into the petitioner's case than in an original suit.

Where, upon the face of a motion for leave to appeal in forma pauperis against a judgment for the defendant given by a Circuit Court in an action for defamation it appeared that the alleged defamation consisted in the statement that petitioner had bewitched the defendant's daughter.

Held, that, as the statement was *in forma pauperis*, there should be no reference to counsel.

Mr. Graham moved on behalf of the petitioner for leave to appeal *in forma pauperis* from a decision of the Circuit Court, held at Burghersdorp, in which an action brought by petitioner against one Cornelius Myburgh for the recovery of damages for slander was dismissed.

It appeared from the petition that the petitioner instituted an action for slander against one Cornelis J. S. Myburgh, at the Circuit Court for the division of Albert, held at Burghersdorp on the 6th October last.

That the presiding judge declined to entertain petitioner's suit, and dismissed same for the reasons set forth in his judgment.

That petitioner gave notice of appeal from the judgment, but was unable to prosecute the said suit as an ordinary suitor, for the reason that he had no means to enable him to do so.

That petitioner was not possessed of property to the amount of £10 in value, excepting household goods, wearing apparel, and tools of trade. He therefore petitioned the Court to allow him to prosecute his appeal *in forma pauperis*.

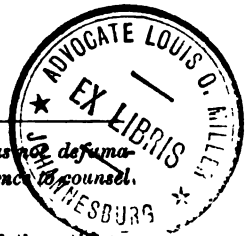
The summons alleged:

1st. That at the time of the alleged slander the plaintiff was a teacher at Diepfontein, in the Orange Free State, but that at present he was out of employment, and that the defendant was a farmer residing at Welgedacht, in the division of Albert.

2nd. That the defendant was the father of one Annie Smit (born Myburgh), who died in or about the month of March, 1892.

3rd. That on or about the 8th day of January, 1892, and at Burghersdorp, the said defendant, in the presence and hearing of Gert Strydom, falsely and maliciously spoke and published of and concerning the said plaintiff the following false and malicious words: "*Andries du Plooy* (meaning the plaintiff) *het mijn dochter paljassed*," which being interpreted into the English language is as follows: "*Andries du Plooy* (meaning plaintiff) *bewitched my daughter*."

4th. That on or about the 22nd or 23rd April, 1892, and at the farm Welgedacht, division of Albert, the said defendant, in the presence and hearing of Roelof M. du Plooy, falsely and maliciously spoke and published of and concerning the said plaintiff the following false, malicious and defamatory words: "*Andries du Plooy* (meaning the plaintiff) *heeft iets aan Annie Myburgh* (meaning defendant's daughter) *haar hand gemiert en haar paljassed*," which being interpreted into the English language is as follows: "*Andries du Plooy* (meaning plaintiff) *rubbed something on Annie Myburgh's hand and bewitched her*."



5th. That on or about the 30th April, 1892, and at Burghersdorp, the said defendant in the presence and hearing of the said plaintiff and the following persons, Jan du Plooy, Roelof du Plooy and Nicolas F. Albertse, falsely and maliciously spoke and published of and concerning the said plaintiff the following false, malicious, scandalous and defamatory words: "*Ik kan niet anders zeggen dan dat mijn dochter* (meaning the said Annie Smit, born Myburgh) *aan die ziekte dood is wat Andries* (meaning plaintiff) *haar aan gedaan heeft,*" which being interpreted into the English language is as follows: "*I cannot say otherwise, or I can come to no other conclusion than that my daughter died of the disease which Andries* (meaning plaintiff) *gave her.*"

6th. That at divers other times and places the said defendant did, in the presence and hearing of divers persons, falsely and maliciously speak and publish of and concerning the said plaintiff the same words as above or words of similar import, meaning by the above that the plaintiff had wrongfully, unlawfully, and wickedly caused the death of the said Annie Smit (born Myburgh) by witchcraft or poisoning. (The words or poisoning were struck out by order of the judge).

That by reason of the said false, scandalous, malicious and defamatory words of the defendant the plaintiff was greatly injured in his character, name and good fame, and had sustained damage to the amount of £150.

The plaintiff prayed for:

- (a) Judgment for the said sum of £150.
- (b) Alternative relief.
- (c) Costs of suit.

The defendant in his plea admitted paragraphs 1 and 2 of the summons, he denied the allegations in paragraphs 3, 4, 5 and 6, and specially denied that he spoke of and concerning the plaintiff falsely or maliciously or at all the words set forth in the 3rd, 4th, and 5th paragraphs of the summons.

He denied that the plaintiff had sustained any damage on account of or by reason of any words spoken by him of the plaintiff; and he prayed that plaintiff's case might be dismissed with costs.

The learned judge who presided at the Circuit Court dismissed the summons and gave the following reasons for his judgment:

In this matter no exception was taken to the summons as it stood, and the objection to it arose entirely from myself.

The plaintiff sued for damages for defamation of character by slander, and the words he complained of are set forth in the 3rd, 4th and 5th paragraphs of the summons.

The words themselves were spoken in the Dutch language, and are in the summons translated as meaning respectively:

- 1. Andries du Plooy bewitched my daughter.

- 2. Andries du Plooy rubbed something on Annie Myburgh's hand and bewitched her.

- 3. I can come to no other conclusion than that my daughter died of the disease which Andries gave her.

The 6th paragraph, after some vague assertions of the use by defendant of the same or similar words on other occasions, proceeded to set forth the innuendo in the following way: "meaning by the above that the plaintiff had wrongfully, unlawfully and wickedly caused the death of the said Annie Myburgh by witchcraft or poisoning."

The first point which occurred to me was whether the words could reasonably bear the meaning ascribed to them, in so far as the charge of causing the death of defendant's daughter by poison was concerned, and it seemed to me that they might bear such a meaning if it was the plaintiff's case, that the defendant meant, or was understood to mean, that the plaintiff had rubbed some venomous substance into, or upon, her hand and had so infected her with a deadly disease; in which case he would clearly have had a good cause of action.

I therefore asked the plaintiff's counsel whether he attributed that meaning to the words or whether the "poisoning" was merely part of the alleged witchcraft. He thereupon admitted that the words were understood to mean and were intended to mean that the plaintiff had applied some magical substance to the hand of the defendant's daughter by means of which she was bewitched and that her death was the result of this. As the innuendo ought not to extend or enlarge the natural meaning of the words used, or introduce new matter, I at this stage ordered the words "or poisoning" to be struck out of the summons. When that had been done the whole charge made by the defendant in the words spoken by him against the plaintiff was that he had rubbed some magical substance upon the hand of the defendant's daughter which had the effect of bewitching her, and that her death ensued in consequence of this bewitching. I therefore called upon plaintiff's counsel to show that these words disclosed a good cause of action, my view being that they were too vain and foolish to have damaged the reputation of the plaintiff in any civilised community.

Mr. Collinson argued at considerable length, but did not succeed in convincing me that this was a case to which a court of law should listen. It is clearly not sufficient for a plaintiff to allege that he has been damaged by the speaking of certain words, he must also show that the words are *prima facie* harmful to his reputation, being of such a nature that they would beget an evil opinion in the minds of right thinking people of ordinary intelligence. Now I can conceive circumstances under which, even in this enlightened age, such

allegations made about a person might tend to damage him or her. There are still some very ignorant and superstitious people alive; and if by any chance a person has to earn his living by exercising a trade or profession in such a community it is possible that his reputation might be damaged and his pocket affected by charges that would have no weight whatever with more enlightened people. In such circumstances, however, I conceive it would be the duty of the pleader, who might draw the plaintiff's statement of claim, to set forth the special circumstances of the case, and allege the special damages that have arisen in consequence of the malicious utterance of the defendant. I should imagine, for instance, that charges of witchcraft made against a man in some of our native territories might seriously damage him in the eyes of his neighbours. But in the present case all that was presented to the Court was the fact that such a charge had been brought against an educated white man in a district inhabited by others of his class, who are the ordinary farming population or landed gentry of the country, and the words alleged to have been spoken in the presence and hearing of divers persons of this description. One is forced to assume them to be persons of ordinary intelligence, and in that case I cannot conceive how the plaintiff's reputation could have been in any sense injuriously affected by such idle talk.

I therefore refused to listen to the case and dismissed the summons, but inasmuch as I thought an exception should have been taken to it I allowed the defendant costs of exception only.

Mr. Graham was heard in support of the petition, and remarked that he could find no case in which an appeal in *forma pauperis* had been allowed in this country from a superior court. Such appeals were, however, allowed in England. Brett's Commentaries, Vol. II, p. 711. "Taylor v. Bouchier" (2 Dickens, 504), "Bland v. Lamb" (2 Jac. and W. 402), "Clark v. Wyburn" (12 Jur., 167), "Drennan v. Andrew" (1 Ch. App. Cas., 800), "Jones v. Gregory" (88 L.J. (N.S.), 681), and since the rules of 1888 "Kiff v. Roberts" (33 Ch. Div., 266). He also referred to Chitty and Archibald's Practice, Vol. II, p. 1182. On the merits of the action he contended the plaintiff had clearly been injured, and that the learned judge had erred in dismissing the case. He cited Van Leeuwen's Commentaries, Vol. II., p. 272.

The Chief Justice said: The practice of this Court is not to allow any person to commence or defend a suit as a pauper until counsel has certified that, in his opinion, there is good cause of action or defence. But counsel's certificate is not necessarily conclusive, because the opposite party may show cause to the contrary. Where it is made clear to the Court that there is no cause of action or defence the rule is not made absolute.

It would seem to follow that if, upon the face of the petition, it is self-evident that there is no cause of action or defence the matter should not be referred to counsel at all.

In the present case judgment has been given against the petitioner by the Circuit Court in an action instituted by him for defamation. That in itself is no ground for refusing to refer the matter to counsel for consideration whether there is good cause for appeal, but it certainly would justify this Court in looking more closely into the case set up for the petitioner than it would in an original suit. The alleged defamation consisted in the defendant's saying that the petitioner had bewitched the defendant's daughter. If this statement is not defamatory there is no reason why the Court should not say so at once and save counsel from the trouble of considering the case, and the defendant from possible expense. The statement would not be defamatory unless it exposed the person, regarding whom it was made, to hatred, ridicule, or contempt. There are certainly foolish people who believe in witchcraft and would detest a man or woman whom they believe guilty of the offence. But the test is what reasonable and sober minded people would think of a person accused of bewitching another, and if that test is applied the petitioner would suffer no injury from the statement made by the defendant. It might be different if the statement were that the petitioner had attempted or practised witchcraft, for that would perhaps have implied deceit on his part. But the statement was that he had actually bewitched a young girl, a thing which no reasonable person would have believed him capable of doing. There will therefore be no reference to counsel.

Their lordships concurred.

[Petitioner's Attorney, G. Montgomery Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. JUDELMAN. { 1892.
Jan. 18th.

Appeal—Verdict of jury—Question of law reserved—Theft—Evidence of crime—Continuous possession.

The question whether there is any evidence of the crime charged may be reserved by the

judge presiding at a trial of a criminal case as a question of law for the consideration of the Supreme Court.

The credibility of the witnesses does not enter into the consideration of such a question, for if any facts have been deposed to on behalf of the prosecution, from which a jury might justly infer that the crime charged had been committed by the prisoner the verdict should not be disturbed.

This case came on for hearing on certain points reserved at the trial of the prisoner for argument before the Supreme Court.

The prisoner was indicted in the High Court, Kimberley, for the crime of theft: "In that upon or about the 1st August, 1892, and at Johannesburg, in the South African Republic, the said Charles Judelman did wrongfully and unlawfully steal a quantity of gold, weighing 2,191 oz., the property of some person or persons unknown; and afterwards, to wit, upon or about the date aforesaid, and from Johannesburg aforesaid, the said Charles Judelman did take, carry, convey, and bring the said gold to Kimberley aforesaid, and thus in the said district of Kimberley, and within the jurisdiction of this Court, did commit the crime of theft." The prisoner was tried twice. At the first trial the jury disagreed, and were discharged. At the second trial the prisoner was found guilty and sentenced to two years' hard labour and to pay a fine of £150, or in default of payment an additional year with hard labour.

At the request of prisoner's counsel the following points were reserved for argument:

1. That there was no evidence of theft to go to a jury.

2. That no evidence was adduced that in the Transvaal Republic theft is a crime.

3. That the property alleged to have been stolen having changed its nature, the crime ceases to be continuous.

From the evidence given at the trial it appeared that the prisoner had brought the gold from Johannesburg in the form of amalgam, and that he had had the gold smelted by two goldsmiths in Kimberley. Chief Detective Ferguson, of Johannesburg, swore that he had known the prisoner since 1890; that he had resided in Fordsburg, a suburb of Johannesburg; that he was a Kafir storekeeper in a small business in a small iron shop, containing ordinary Kafir truck valued from £40 to £50; that prisoner had not been the manager of any mining company since 1890, nor connected with any company that witness knew of; that according to paragraph 71, Gold Law, 1891, any private person must have a licence to hold rough gold; that after the prisoner's committal for

trial the Transvaal authorities were communicated with, but declined to have anything to do with the matter. No evidence was, however, given to show that the gold had been stolen from any particular company or mine.

Detective-Officer Trumble, who arrested the prisoner in the Oudtshoorn Hotel, Kimberley, swore that he asked the prisoner if he had any permit or authority to show how he obtained possession of the gold. The prisoner said he had none. He also said that he had bought it from different parties. Asked from whom. He said he did not know their names. He also said that the gold was amalgam when he bought it and that he had it smelted in Kimberley.

Asked whether he had a permit from the Transvaal Government to be in possession of the gold. He first said no and then that he had lost it. Asked if he could give a satisfactory account of his possession of the gold. He could not. He was then arrested.

Vera Peter, a jeweller, who smelted the gold for the prisoner, swore that the prisoner told him that he got the gold from Johannesburg, that he was manager of a company there, and that in six weeks' time he would have more gold to be smelted.

Frederick Bernard Ueckermann, second clerk in the State Attorney's Department, South African Republic, produced the Gold Laws Act of 1st September, 1891, and 1st September, 1892, which have reference to amalgam (71 and 71A Law of 1891). Witness deposed that under these sections persons require a licence to deal in rough gold, and if found in possession they have to give a satisfactory explanation.

At the trial no evidence was called for the defence.

Mr. Juta (with him Mr. Searle) was heard on behalf of the prisoner, and contended that there was no evidence whatever of theft. There was no proof that anyone had lost the amalgam, nor was there evidence to show that the prisoner had not had a licence since the Gold Law had been in force. The Crown must prove its case, and having failed to do so the verdict was wrong. There was no secrecy about the prisoner's movements; he had acted in the most open manner in admitting to the detective who arrested him that he had gold in his possession, and in employing two goldsmiths to smelt it. This case was clearly distinguishable from the "Queen v. Smith" (2 Juta, 257).

The Attorney-General, for the Crown, contended that the Court had no power to override the verdict of a jury on a question of fact. A judge in this country had no power to withdraw a case from a jury. Judges in England were in the habit of doing so in accordance with long established custom, but there was nothing in Act 5 of 1879 which gave judges in this colony that power. On

the merits of the case he urged that the jury had sufficient evidence before them to justify the verdict.

Mr. Juta, in reply: The questions reserved are purely questions of law. It is a question of law whether certain facts constitute the crime charged.

The Chief Justice said: The case has been ably argued on behalf of the prisoner, but the whole of the argument has proceeded upon the assumption that this is a direct appeal against the verdict of the jury. In law there is no such appeal, unless there has been illegality or irregularity in the proceedings. The Judge may, however, reserve any question of law, which may arise in the trial, for the consideration of this Court and in this manner there may be an indirect appeal to this Court. But the appeal must be confined to the question of law which has arisen.

In the present case three questions of law arose at the trial of the prisoner, but I shall confine myself to the only one which has been raised and argued in this Court. That question is whether, assuming the facts deposed to on behalf of the prosecution to be true, there was any evidence of theft by the prisoner. On behalf of the Crown, it has been contended that this is not such a question of law as could be reserved for the consideration of the Court. I do not agree with this contention, whether certain facts constitute a definite crime is a question of law. A jury may at a trial disregard the direction of the judge that the facts deposed to do not constitute the offence charged, and may convict the prisoner.

The judge, however, may reserve the question of law arising out of his direction for the consideration of this Court, and if his direction was right, this Court would have the power, under the 7th section of Act 5 of 1879, to order that the judgment be set aside notwithstanding the verdict.

It is evident that the question of the credibility of the witnesses for the prosecution does not enter into the present inquiry. Assuming their evidence to be true, was the jury justified in convicting the prisoner of theft? If any inferences could be legitimately drawn from that evidence, it was the province of the jury to draw them. The prisoner was found at Kimberley in possession of over 2,100 ounces of gold amalgam, which he there dealt with by having it smelted into pure gold. He had recently come from Johannesburg, where numerous gold companies are employed in extracting gold from the crushed rock, and where the prisoner himself had been engaged, not as a gold miner, but as a small store-keeper. The only persons, who could legitimately own gold amalgam, would be those concerned in gold mining or purchasers from them.

The prisoner gave two contradictory accounts as

to how he came into possession of the amalgam, one of which, at all events, he must have known to be false.

He admitted that he had brought the amalgam from Johannesburg, and at the trial he tendered no explanation or evidence of any kind how, or from whom, or for what purpose, he had obtained it. No fault would have been found with the jury if they had acquitted the prisoner; but can they be held to have convicted him without any evidence whatever of the fact? If the gold was stolen at Johannesburg the prisoner's continued possession and dealing with it here rendered him amenable to the Courts of this country. If he had been tried at Johannesburg, a jury there would have been legally justified in inferring from the facts deposed to on behalf of the prosecution that he had stolen the amalgam from some person unknown. The same inference was drawn by the jury at Kimberley, and, as it is impossible to say that there was no legal justification for such an inference, the question reserved must be answered in favour of the Crown.

Mr. Justice Buchanan concurred. He remarked that there was the condition of the person, the nature of the property; there was the manner of dealing with the property and prisoner's own statement, and from these facts there was sufficient for the jury to draw the inferences they did and find the prisoner guilty.

Mr Justice Upington also concurred.

The questions reserved were accordingly answered in favour of the Crown.

[Attorney for the prisoner, Gus Trollip.]

REGINA V. BROODRYK. { 1898.
{ Jan. 18th.

Pound Ordinance — Trespass — Rams — Penalty.

The owner of more than one ram found trespassing on the property of any other person is liable to the penalty provided by the 52nd section of Ordinance 16 of 1847, in respect of each such ram.

This was an appeal from the conviction of the accused by the Resident Magistrate of Carnarvon.

The accused was charged with the crime of contravening section 52, Ordinance 16 of 1847, in that on or upon the 26th day of August, 1892, and at or near De Cypher, in the said district of Carnarvon, certain twenty-five rams above the age of twelve months, the property of or in the lawful possession of the defendant, were found trespassing upon the property of Jacobus Gildenhuys, of De Cypher aforesaid. The defendant was found guilty, and sentenced to forfeit the sum of £1 in respect of

each ram found trespassing, viz, twenty-five in all, and in default to be imprisoned and kept at hard labour for one month. From this sentence the present appeal was brought.

Mr. Searle was heard in support of the appeal, and contended that under section 52 of the Ordinance the Magistrate erred in imposing a penalty of £1 in respect of each animal trespassing, and that the greatest penalty he could have imposed was £2. The person who suffered by the trespass had his civil remedy in damages. He cited "*Rabie v. Olifant*" (1 E.D.C., 362) and "*Van der Westhuizen v. Raubenheimer*" (Buchanan, 1876, page 87). The Resident Magistrate had not sufficient evidence before him that the rams were the property of the defendant.

Mr. Giddy, for the Crown, was not called upon.

The Chief Justice said: The objects of the 52nd section of the Ordinance are clear. They are to encourage the breeding of good stock and to punish those who, by their negligence or malice, allow their rams to become the means of contaminating the breed of others. The injury done to a flock of ewes would be in proportion to the number of rams let loose amongst them. It is not unreasonable, therefore, to hold that the Legislature intended the penalty to vary with the number of rams trespassing. The proviso that, "*if any such ram shall be found among ewes the penalty shall be double*" would seem to support this view. The enactment is not that "*every owner of rams, &c., trespassing, &c.,*" shall be liable, but that "*the owner of every bull or ram, &c., found trespassing upon the property of any other person shall be liable*" to the penalty. Upon the whole I am of opinion that the owner is liable to the penalty in respect of each ram found trespassing. The appeal must therefore be dismissed.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinne.]

REGINA V. JIM AND OTHERS. { 1893.
Jan. 13th.

Native Territories Penal Code—Act 24 of 1886, section 198—Theft of goats—Evidence of concert—Conviction sustained on appeal.

This was an appeal from a judgment of the Eastern Districts Court confirming the conviction of the prisoners by the Resident Magistrate for Xalanga.

The prisoners, eight in number, were charged with the crime of contravening section 193, Act 24 of 1886, in that "upon or about the 15th day of November, 1892, and at or near Colma, in the district of Xalanga, the said prisoners did each

and all, or one or some of them, wrongfully and unlawfully steal two goats, the property of Daniel Colyn."

All the prisoners except one, called Farm, were found guilty, and sentenced to twelve months' imprisonment with hard labour, and to pay 40s., the value of two kapaters.

It appeared from the evidence at the trial that the farmer who lost the goats in question had been missing stock for some time, and that he lodged a complaint with the local detachment of the C.M.R., who set a watch for the thieves.

One of the troopers in that force swore that on the night of the theft he saw four men (natives) passing the spot in which he was hiding, that they went in the direction of Colyn's farm, and that he saw four men returning with two goats in their possession tied with reims, that they went to the kraal belonging to one of the prisoners (Old Booy), that he still watched them, that they stopped at the side of the kraal; one of them then went into a hut and came out again to the others. Witness was about twenty or thirty yards from the kraal at the time. When the man came out of the hut, two of the others held a goat, while the third man killed it. Witness gradually approached them, when one of the men saw him, they then let the one goat go and left the carcass of the other. Three men ran into one hut, and one ran into another hut. Witness stood at the door where the one went in and called out, and three men came out. Witness asked them what they were running for. All the prisoners were found in the kraal by witness, some inside and some outside. The prisoner Farm came up afterwards. The body of the goat was lying close up to the stock kraal and a few yards from the huts in the kraal.

Cross-examined: He saw four men driving the goats. When he got to the kraal three men came out of the hut into which one of the men who were driving the goats had run. The carcass was outside the cattle kraal. All the people could have seen the carcass of the goat. From three of the huts the carcass could have been seen.

Mr. Juta was heard in support of the appeal, and contended that the case was merely one of suspicion. There had been no identification, and in any case seven men could not be convicted of an offence which had only been committed by four.

Mr. Giddy, for the Crown, was not called upon.

The Chief Justice said: These prisoners were tried before a very experienced magistrate in a native district and convicted. They appealed to the Eastern Districts Court, which also had had great experience in these native cases, and the Eastern Districts Court confirmed the sentence. We were now asked to reverse the decision of

the Eastern Districts Court. I would not be a party to reversing that decision unless it was clear to me that injustice had been done to the prisoners, and there is no evidence of that. It is clear that all the prisoners were guilty of theft. All the seven prisoners lived in the same kraal. Four of the guilty men were seen coming towards the kraal with the stolen property. One of them went into one of the huts, and came out again after the goat was killed. When the native constable came up they rushed into different huts. The constable went into the hut into which one had run, and as I read the evidence, when he called out three of them forthwith came out. The question "Did they come out immediately?" was not put to him in cross-examination, which would have been done if two of them came out long afterwards. I take it, therefore, that these three, at all events, came out together with the guilty one, showing, at all events, that in that hut these people were up and doing at the time. Now, if there was any previous concert between those who remained behind and those who actually stole then they were all guilty together. The only question was whether there was not some evidence before the Magistrate to justify him in finding that there was such concert. The point which was most against the prisoners was that none of them came forward to point out the guilty men. That was what innocent men would have done. It was suggested that they were asleep. Even those who were asleep must have known who were the guilty ones. An innocent man would have told the Magistrate that such and such men were in the hut when he went asleep and that such and such men were not, and so the guilty ones would have been ascertained. But the fact that there was no such evidence was sufficient under the circumstances to justify the Magistrate in dealing with the prisoners as he did. In my opinion there was evidence of concert among the prisoners, and the appeal must be dismissed.

Their lordships concurred.

[Attorney for the appellants, G. Montgomery Walker.]

SUPREME COURT.

(IN CHAMBERS.)

[Before Mr. Justice BUCHANAN { 1893.
and Mr. Justice UPINGTON, { Jan. 17th.
K.C.M.G.]

IN THE ESTATE OF THE LATE MARTINUS PAKKIES.

Mr. Searle moved for leave to the executors dative to raise a loan on mortgage of the farm Melkspruit, in the district of Mount Currie, the property of the estate, for the purpose of discharging all liabilities. Pakkies died in 1890, leaving a wife married by Christian rights and two by native custom. There was a dispute as to the disposal of the estate. The matter came before the Eastern Districts Court, and subsequently before the Circuit Court, when his lordship Mr. Justice Buchanan gave judgment for the return of the cattle (of which the concubines had taken possession) or payment of £100. He understood that the cattle were handed over to the wife by the Christian marriage, and now leave was asked to mortgage the farm to an amount not exceeding £500, in order to discharge the liabilities on the estate. The heirs, major and minor, had signed a consent paper.

Mr. Justice Buchanan said he remembered the case. The Chief Magistrate was thoroughly conversant with all the facts, because he tried the case in the first instance. The Court would therefore make the order authorising the executors to raise a loan for such an amount as the Chief Magistrate might certify as necessary, the said amount not to exceed £500.

HITCHCOCK V. STEYTLER AND ANOTHER.

Mr. Schreiner appeared for the applicant in this motion, which was for an order restraining the respondent from taking his seat as a member of the Divisional Council for Britstown, and declaring his election thereto null and void.

Mr. Searle appeared for respondent, and asked for a postponement.

The question was allowed to stand over until the 24th, the question of costs being reserved.

KEENAN V. KEENAN.

Mr. Watermeyer moved for a rule nisi requiring petitioner's husband to show cause why she should not be admitted to sue him *in forma pauperis* in an action for restitution of conjugal rights. Defendant had been last heard of at Uitenhage.

The Court granted the order.

IN THE INSOLVENT ESTATE OF FRANCOIS R.
DE VILLIERS.

Mr. Graham moved in this matter, which was for authority to the provisional trustee to administer and finally liquidate the estate. There was, he said, no opposition by the creditors.

The Court appointed a provisional trustee to sell and administer generally, pending the election of a permanent trustee.

ALIWAL NORTH BOARD OF EXECUTORS V.
LOWEY.

Mr. Watermeyer moved for the attachment *ad fundandam jurisdictionem* of certain lot of ground in the town of Aliwal North, in an action about to be instituted against the respondent for the amount of a mortgage bond. In 1886 defendant passed a bond in favour of the Board of Executors for £60. This bond, with interest at 8 per cent., was still unpaid. Shortly after the passing of the bond defendant left Aliwal North, and had not been heard of for some time.

The Court made the order to attach the property, and leave was granted to sue by edictal citation, the citation returnable on February 28; personal service if possible; if not, publication in the *Gazette*.

IN THE ESTATE OF FREDERICK WILHELM
DREYER.

Mr. Juta moved for leave to Johann George Miller to resign his trust as one of the executors testamentary in the above estate. Everything had been done under the will. The property had been properly realised.

Mr. Justice Buchanan said the matter must go before the Master, as there might be some calls upon the executor. The application was accordingly postponed.

SNYMAN V. SNYMAN.

Mr. Juta applied for a rule *nisi* for leave to plaintiff to sue *in forma pauperis*, and asked that the rule might be made returnable on the first day of next term.

The Court granted the order as craved and ordered personal service of the rule.

SUPREME COURT.

(IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, { 1898.
K.C.M.G. (Chief Justice), Mr. { Jan. 24th.
Justice BUCHANAN, and Mr. {
Justice UPINGTON, K.C.M.G.]

HAGEMANN V. HAGEMANN.

Mr. McLachlan moved for leave to sue *in forma pauperis* by edictal citation in an action against petitioner's husband for divorce.

The Court appointed Mr. Jonbert to take the reference in the case.

IN THE INSOLVENT ESTATE OF DAVID J.
MALAN.

Mr. Watermeyer moved for authority to the provisional trustee to administer and liquidate the estate. It was, he said, suggested that Mr. George Staytler should be appointed trustee.

The Court made the order, and gave the provisional trustee the usual powers.

In re THE ALIWAL NORTH BOARD { 1898.
OF EXECUTORS. { Jan. 24th.

Mr. Molteno, on behalf of Mr. W. G. Anderson, one of the creditors, applied for an order placing the Board under operation of the Winding-up Act. Counsel stated that what was wanted was some impartial person not connected with the company, who could be trusted to investigate the affairs of the concern. The administration should not be left in the hands of the present liquidators. He put in the share and investment accounts, and alleged that there had been speculation in gold shares amounting to gambling.

Mr. Searle, for respondents, admitted that a portion of the share transactions took place when they were directors, four years ago. He contended that it was unnecessary to proceed under the Winding-up Act. That would entail much expenditure which proceeding by voluntary liquidation would avoid. He referred on this point to Lindley, to "*In re Beaufolais Wine Co.*" (8 Ch. App., 15) and "*In re General International Agency Co. (Limited)*," (86 Beavan, 1.)

The Chief Justice said the matter would stand over to give an opportunity to the liquidators to explain their conduct, and if possible to show that, although they were directors at the time when the share speculations took place, they took no part in them or opposed them. It was possible they might have been ignorant of the transactions, in which case it would be hard to punish them.

In re THE ANTE-NUPTIAL CONTRACT OF FLEMMER AND PHILIPS.

Mr. Watermeyer moved for leave to the trustee under the said contract to raise a loan on security of certain life policy therein ceded for the purpose of providing for the education of the minor children of the marriage. The loan was not to exceed £205. There were four children. The South African Mutual had agreed to lend the money at 6 per cent. The parents were both alive, but the trustee (a brother) would have control of the money.

The Court authorised the trustee to raise the loan in such sums from time to time, on security of the life policy, as might be necessary for the education of the minor children, the loan not to exceed £205.

BUERSKI V. BUERSKI.

Mr. Searle moved for leave to plaintiff to sue by edictal citation in an action against his wife for divorce by reason of her alleged adultery. The wife was resident in Birmingham, and refused to follow her husband to the Colony.

The Court made the order, personal service if possible; if not, one publication in the *Birmingham Daily Post* and one in the *Government Gazette*, citation returnable on 1st May next.

SNEIGH V. SNEIGH.

Mr. McLachlan moved for leave to petitioner to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

The matter was referred to Mr. Joubert.

SUPREME COURT.

(IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, { 1893.
K.C.M.G. (Chief Justice), Mr. {
Justice BUCHANAN, and Mr. { Jan. 31st.
Justice UPINGTON, K.C.M.G.}]

Ex parte FLEMMER.

Mr. Molteno moved for leave to raise a loan on security of certain life policy settled on petitioner's wife and children, for the purpose of repaying money spent by petitioner in improvements to the landed property of his wife and children. The amount sought to be raised was £255.

The Court made the order.

In re THE CAPE OF GOOD HOPE { 1893.
BANK. { Jan. 31st.

Mr. Schreiner, Q.C., moved for the sanction of

the Court to certain compromises proposed to be effected by the official liquidators with shareholders and debtors. The compromises are as follows:

W. A. Bendixon, of Potchefstroom, £85 (as debtor), offers £30 in three promissory notes of £10 each, of which one has been met, and certain securities in the bank's possession. Release conditional on due payment of the two remaining promissory notes.

Bindon & Bell, of Pretoria, £1,060 (as debtors), offer £50 cash, already paid, and cession of all securities in the bank's possession.

P. J. Borchers, of Potchefstroom, £806 11s. 6d. (as debtor), offers 2s. 6d. in the £, already paid.

R. Buller, of Potchefstroom, £28 11s. 4d. (as debtor), offers £5 cash, already paid.

Croxford & Smithers, of Johannesburg, £61 4s. 6d. (as debtors), offer £10 cash and cession of promissory note for £70. Release conditional on these terms being carried out.

Estate of Letterstedt & Co., of Cape Town, £5,846 1s. 7d. (as debtors), offer to pay principal in full, of which 15s. in the £ is to be paid on this composition being sanctioned by the Supreme Court, and balance—5s. in the £—in two promissory notes, payable at twelve and twenty-four months from date of acceptance of this composition by the Supreme Court, made by the *Vicomte de Montmort*. The notes to be secured by a second bond over the estate; the first bond to be passed to equal amount of the first bond now held, and 15s. in the £ to concurrent creditors; the second bond to be cancelled on due payment of these promissory notes, and the release to be conditional on all concurrent creditors being placed on the same footing as the bank is placed.

Estate of Walter Ward, £486 9s. 6d. (as debtor), offers 15s. in the £, already paid.

T. Rosenstein, of Pretoria, £50 (as debtor), offers £22 10s. cash, already paid.

Mrs. E. M. F. Watts, of Walsall, England, £1,320 (a shareholder), offers £100, deposited in trust against release.

We, the official liquidators of the Cape of Good Hope Bank (Limited), hereby certify that the foregoing list has lain open for inspection at the offices of the bank, Union Chambers, St. George's-street, Cape Town, for a period of fourteen days, reckoning from the 1st instant.

DAVID MUDIE,
JOHN R. REID,
H. FELTHAM,
H. BOLUS,
L. A. VINTCENT,

Official Liquidators.

Cape Town, January 30, 1893.

The Court sanctioned the proposed compromises.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. } 1898.
Justice BUCHANAN, and Mr } Feb. 1st
Justice UPINGTON, K.C.M.G.]

ADMISSIONS.

Ex parte COLLINSON.

On the motion of Mr. Tredgold, Mr. Francis John Collinson was admitted as an advocate. The oaths to be taken before the Registrar, High Court.

Ex parte RUBIE.

The Attorney-General moved for the admission of Mr. John Fouthill Rubie as an advocate.

Mr. Rubie took the oath and was duly admitted.

Ex parte GRIMMER.

On the motion of Mr. Tredgold, Mr. William Paterson Grimmer was admitted as an attorney and notary. The oaths to be taken before the Registrar, High Court.

REHABILITATIONS.

On motion from the bar, the following insolvents were granted their rehabilitation: Henry Lionel Creed, Charles Henry Phillips, and Wm. Stephen James Sellick.

PROVISIONAL ROLL.

WILKINSON V. WHEELER.

Mr. Thorne moved for provisional sentence for £125, being the amount of a promissory note now due.

Granted.

LANDSBERG V. HOFMEYER.

Mr. Joubert moved for provisional sentence for £80, interest on a mortgage bond.

Granted.

ALFORD AND WILLS V. THEUNISSEN.

Mr. Oostens moved for provisional sentence on a promissory note for £10.

Granted.

LENNON AND CO. V. VIAN.

Mr. Jones moved for judgment under Rule 829 for £10 16s. 3d.

Granted.

TRIAL CASES.

HOSKING V. HOSKING. } 1898. Feb. 1st.

Mr. Graham appeared for plaintiff; the defendant was in default. This was an action for restitution of conjugal rights, failing which for divorce.

Ada Hosking, plaintiff, deposed that she was married on 8rd April, 1888. She was a widow when she married Mr. Hosking. Subsequent to her second marriage she lived in Cape Town. There were two children of the second marriage—one alive, aged one year and nine months. She lived happily with her husband at first, but on going to Johannesburg they did not get on so well, and he deserted her two years ago. He had not supported her since. She believed her husband went to Kimberley afterwards. He was now in Cape Town. She had written to him but had not received an answer. She wished to have the custody of the child, and asked that her husband should pay for its maintenance. They were married in community of property. Her husband was now in Mr. McKenzie's employment, but she did not know what his wages were.

The Court granted a decree for restitution of conjugal rights with costs, ordering defendant to return to plaintiff on or before 14th February, failing which defendant was called upon to show cause before the last day of term why a decree of divorce should not be granted, and why plaintiff should not be entitled to the custody of the child, and why defendant should not pay £1 per month for the maintenance of the child until it attain the age of sixteen years.

[Plaintiff's Attorney, J. Hamilton Walker.]

CLAUSSEN V. CLAUSSEN. } 1898. Feb. 1st.

Mr. Sheil appeared for the plaintiff; the defendant was in default.

This was an action for divorce on the ground of defendant's adultery with one Maria Phillips.

Agnes Louisa Claussen, plaintiff, deposed that she was married on 1st November, 1886. There were no children of the marriage. She was a widow when she married Mr. Claussen, and was at that time proprietress of the City Laundry. Her life with defendant was not a happy one. He neglected her, and was guilty of improprieties with one Maria Phillips. She forgave

him, and it was agreed that Maria Phillips was to leave the Colony. She did leave the Colony, but returned after two years' absence, when her (plaintiff's) husband again renewed his guilty conduct with Maria Phillips. Plaintiff then had a deed of separation executed. She last saw her husband on 6th October, 1892.

Jan Isaacs, a cart driver for the City Laundry, remembered the arrival of the Athenian in October last year. He saw Mr. Claussen along with Maria Phillips on board. He did not know where they went.

Abdol Davids, a cab-driver, deposed that he drove Mr. Claussen and a woman, whom he identified as Maria Phillips, to the Fountain Hotel from the Docks on 6th October.

Catherine Redlinghuys deposed that she was chambermaid in the Fountain Hotel in October last. She identified the photos produced as the gentleman and lady who arrived at the hotel on the 6th October and occupied one bedroom.

The Court granted a decree of divorce with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buismann.]

JACKSON V. JACKSON. { 1898.
Feb. 1st.

Mr. Molteno for plaintiff; defendant in default. This was an action for divorce on the ground of desertion and adultery.

Thomas Carr Jackson, plaintiff, deposed that he was a road overseer and resided at present in East London. He first met his wife in 1879, and was married on March 10, 1880. He and his wife lived in various parts of the Colony, and eventually they went to Kimberley. On 2nd August, 1886, his wife left Kimberley with the object of visiting her mother in Graham's Town. She only went as far as Cradock, whence she proceeded to Cape Town. She sent him a letter from Cape Town. It commenced: "By the time you receive this letter I'll be far away on the sea, going to a strange land with a man whom I love." There was a man named Edwin Oatts who left Kimberley a month before Mrs. Jackson. He was a schoolmate of plaintiff's. Witness understood that his wife stayed with this man a short while in Cape Town, and then sailed with him for Sydney. He had received two letters from his wife—one dated Sydney, 5th July, 1891, and another 29th February, 1892. There were no children of the marriage.

Louisa Rousseau, a servant in the Colonnade boarding-house, Greenmarket-square, remembered Mrs. Jackson and a man staying for two days in the house.

Mrs. Thorne, who kept the boarding-house, said

Mr. Oatts introduced the lady as his wife. She believed he was married. That was in August 1886. They left by the Australian steamer.

The Court granted a decree of divorce, with forfeiture of the benefits of the marriage in community.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne.]

HASSERIIIS V. HASSERIIIS. { 1898.
Feb. 1st.

Mr. Searle for plaintiff; Mr. Graham for defendant.

This was an action for divorce on the ground of defendant's adultery.

Maria Christine Hasseriis, plaintiff, deposed that she was married to defendant on 17th September, 1878, at the Magistrate's Court. She was a Dane. Since that date they had lived together in the town and suburbs. She carried on a laundry at; Observatory-road, and her husband managed a laundry in Plein-street. In 1890 plaintiff visited Denmark, and brought out a girl named Hilda Errebei to assist in the laundry work. Defendant had undue familiarities with Hilda, and in consequence of his conduct she consulted her attorney. Defendant handed over £70 to the attorney, and gave Hilda £500 in notes, and also the keys of the house. He turned plaintiff out of the house. She asked him how he could give money away that she (plaintiff) had earned. He said it was his money. He would not give her her clothes, though she had since got some of them. Her husband possessed considerable landed property. They were married in community.

Maria Jackson, defendant's cook, deposed that Hilda Errebei was on intimate terms with defendant. They behaved to each other as man and wife and occupied the same bedroom.

The Court granted a decree of divorce, with costs of this action and of the interdict proceedings, and ordered a division of the common property of the estate, appointing Mr. E. R. Syfret as receiver.

[Plaintiff's Attorney, D. Tennant, jun.; Defendant's Attorney, C. C. Silberbauer.]

GENERAL MOTIONS.

SNYMAN V. SNYMAN.

Mr. Juta moved to make absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce. The applicant was absolutely destitute, and he asked

that, as she lived in the Middelburg district, she might be allowed to give her evidence on affidavit.

The Chief Justice said the declaration should first be served on defendant, and the application as to the evidence on affidavit could afterwards be renewed.

The Court made the rule absolute.

In re DREYER'S ESTATE. { 1898.
Feb. 1st.

Mr. Juta moved for leave to Johan G. Muller, one of the executors testamentary of the said estate, to resign his trust. The petitioner and Gertruida Francina Adrana Dreyer (now married to Godfrey F. Baynes) were appointed executors testamentary of the estate of the late Frederick Wilhelm Dreyer. They caused a liquidation and distribution account to be filed with the Master, and a deed of *kinderbewys* was executed for the amount of inheritance due to the minors, and all the assets of the joint estate were handed to the survivor, in terms of the will and oodiciil. The petitioner executed a deed of release with his co-executor, mutually discharging each other from all liability, and agreeing that the petitioner should be released from the trust as co-executor. The petitioner, desiring to be relieved, tendered his resignation to the Master, and he asked the Court to grant an order authorising the Master to accept the resignation.

The Chief Justice said that according to counsel's own statement the applicant had administered the estate as executor. Well, if he had administered the estate, how could they grant him the release? Besides, he stated no special ground why he asked for release. The application must be refused.

HITCHCOCK V. STEYTLER.—ROUX { 1898.
V. CIVIL COMMISSIONER OF { Feb. 1st.
BRITSTOWN.

Election for Divisional Council—Civil Commissioner—Nomination—Rectification of mistake—Act 40 of 1889.

When once a Civil Commissioner has officially declared the final result of any election for members of the Divisional Council in terms of Act 40 of 1889 he is functus officio and cannot direct the taking of further proceedings which might lead to a different result.

Until the election for any district has taken place the Civil Commissioner may correct any mistakes he may have made in the preliminary proceedings, provided that he

does not contravene any provision of the Act.

A nomination paper signed by four persons entitled to vote for a district and by a fifth person in the name of a deceased registered voter may be treated by the Civil Commissioner as null and void, and if, by mistake, he has published the nomination of the candidate, he may revoke such publication and declare the only other candidate who had been duly nominated to be duly elected for such district.

The case of Osterloh v. Civil Commissioner of Caledon (2 Searle, 240) distinguished and followed.

By consent, these two applications were heard together.

In the first Mr. Schreiner, Q.C., moved for an order restraining the respondent Steytler from taking his seat as a member of the Divisional Council of Britstown, and setting aside his election thereto as null and void; and in the second he moved for an order declaring applicant to have been duly elected as member for Ward No. 8 of the Divisional Council of Britstown, and requiring the respondent to pay the costs of this application *de bonis propriis*.

Mr. Searle appeared for the respondents in both matters.

In the month of October last Britstown was constituted a fiscal division, and in terms of Act 40 of 1889, the Civil Commissioner of Britstown caused a notice to be inserted in the *Government Gazette* calling upon voters in the respective districts comprising the division of Britstown to nominate a candidate or candidates for every such district respectively, and the notice was in substance according to the form prescribed in section 81 of Act 40 of 1889, and the 80th November was fixed as the last day for receiving such nominations.

On or about the 80th November last, the Civil Commissioner received four nomination papers for Ward No. 2, viz., one for the applicant in the first matter, and three for the respondent Steytler.

The Civil Commissioner then proceeded to examine the nomination papers received for Ward No. 2, and compared them with the list of registered voters for Ward No. 2. The Civil Commissioner admitted that the name of one A. L. Badenhorst, owner of Vogelstruispoort, was placed by him on the list of registered voters for Divisional Council purposes on Ward No. 2, but alleged that it was done in error, as he discovered afterwards (1) that the farm Grafwater, portion of Vogelstruispoort,

now situated in Ward No. 2, had been transferred from Victoria West to the Britstown division; (2) that one Jan M. Blomernus figured as the owner, and as such was registered as a voter; (3) that no such name of a registered voter as A. L. Badenhorst was transferred from the Victoria West to the Britstown division; (4) that a farm called Vogelstruispoort, now situated in Ward No. 4, Britstown, was transferred from the Richmond to the Britstown division, and that one A. L. Badenhorst figured as the owner, and as such was registered as a voter; and (5) that by mistake the name of A. L. Badenhorst, which was transferred from Richmond to Britstown division, was placed by him (the Civil Commissioner) as registered voter in Ward No. 2 instead of Ward No. 4.

The Civil Commissioner then struck off the name of A. L. Badenhorst from the list of voters for Ward No. 2, and added same to list for Ward No. 4.

With regard to the second application the respondent explained in his affidavit that after publishing the notices required by Act 40 of 1889 he received two nomination papers for Ward No. 3, one for the applicant (Roux) and one for Edward Frost Jackson. There were sixteen signatures on applicant's nomination paper, and out of this number ten were struck off, being five of persons not registered as voters, and five of voters who had also signed Jackson's nomination paper, and amongst the five last mentioned was the name of one J. S. Roux, a brother of applicant.

The Civil Commissioner alleged that he observed at the time that the signature of the said J. S. Roux on applicant's nomination paper was not in the same handwriting as that of J. S. Roux in Jackson's nomination paper; the signature on the former's nomination paper looked as if it had been signed by a lady, and quite different to the other.

The name of J. S. Roux was then struck out off both nomination papers, and on the 2nd December the Civil Commissioner declared the applicant duly elected for Ward No. 3, and advertised a notice to that effect in the *Government Gazette*. Subsequently Jackson protested against applicant's election, and the Civil Commissioner cancelled his notice of the 12th December declaring applicant elected as a member to represent Ward No. 3, and gave applicant notice that such had been done, and that a poll would be held.

The further facts appear from the judgment of his lordship the Chief Justice.

Mr. Schreiner, Q.C., was heard in support of both applications.

Mr. Bearle for the respondents.

Cur ad vult.

Postea (2nd February).

The Court delivered judgment.

The Chief Justice said: There are two applications before the Court relating to the recent election of members for the Divisional Council of Britstown. The application made by D. J. Roux is for an order declaring him duly elected as member for Ward No. 3, and interdicting the Civil Commissioner from interfering with the applicant's right to a seat in the Council. He claims his right to the seat by virtue of the Civil Commissioner's notification in the *Gazette* in terms of the 89th section of Act 40 of 1889, that he had been duly elected. It appears, however, that the Civil Commissioner was informed, shortly after such notification, that he had made a mistake in refusing to accept the nomination of Jackson, another candidate; the ground of refusal being that it had not been signed by the requisite number of duly-qualified voters. Upon receiving this information the Civil Commissioner investigated into the matter, and came to the conclusion that the nomination of Jackson was in order. I am by no means satisfied that he was right in coming to this conclusion. If J. S. Roux did in fact authorise his wife to sign the nomination paper of Jackson, then he did practically sign two nomination papers, for he also signed that of the applicant, and no mistake was made by the Civil Commissioner in erasing from both nominations the name of J. S. Roux, in terms of the 81st section of the Act. But assuming that there had been a mistake, had the Civil Commissioner any authority to correct it after he had duly notified the election of the applicant? The case of "*Osterloh v. Civil Commissioner of Caledon*" (2 Bearle, 240) is directly applicable to the present case. It was decided under a different Act, but the principle which underlies it must govern the present case. That principle is that when once the Civil Commissioner has declared the final result of an election he is *functus officio*, and is powerless to direct fresh proceedings which might lead to a different result. There would be no finality in any election if it were competent for the Civil Commissioner to review his own final decision. At all events, the case of *Osterloh* is directly in point, and the Court will therefore grant an interdict restraining the respondent from interfering with the applicant's right to a seat in the Council, or from taking further steps for the election of a member in the place of the applicant. As to the further prayer for an order declaring the applicant to have been duly elected, it appears to me that without notice to Jackson, who is no party to this application, such an order should not be made. As to the costs, the order not to interfere with the applicant's right to sit is made upon the Civil Commissioner not as the returning officer,

but as the chairman of the Council, and it is therefore right that the Council should at all events pay the applicant's costs. In order, however, to give the Council an opportunity of objecting, the order will be that the Council pay the costs of the applicants, unless it shall show cause to the contrary on or before the last day of term. In regard to Hitchcock's application, it has been made in opposition to one David Andrews Steytler, the sitting member for Ward No 2, and duly declared as such by publication in the *Gazette*. In this case also the dispute arose out of a mistake made by the Civil Commissioner and a correction of that mistake. But the mistake was not in reference to the election, but to the nomination of candidates, and the correction was made before the election was declared. That makes all the difference between this case and that of Roux. The fifth part of Act 40 of 1889 provides the machinery for the election of members of the Divisional Council. The election of members is the result aimed at, and when that result has been attained the machinery is no longer required, and the officers employed have no longer any duties to perform. But until the result has been attained the Civil Commissioner surely must have the power to correct any mistakes made in the preliminary proceedings, so long as he does not contravene any provision of the Act. The mistake in the present case was that he had accepted the nomination of the applicant signed by only four voters qualified to sign. It is true that the nomination paper bore the signature of a fifth voter, but it was clearly proved that he was dead and that the person who signed in his name had no authority to do so at all. The nomination, therefore, in terms of the 31st section of the Act, was null and void. Upon the Civil Commissioner discovering this, he was in my opinion justified, before the result of the election for Ward No. 2 was declared, in correcting his mistake and treating the nomination of the applicant as null and void. There remained only one candidate, namely, the respondent Steytler, who had been duly nominated, and the Civil Commissioner properly declared him to have been duly elected. This application, therefore, must be refused, with costs.

Mr. Justice Buchanan in concurring said: Section 39 (a) of the Act enacted: That if, in any case, no greater number of candidates shall have been nominated for any district than the number to be elected, no poll in or for such district shall take place, and the candidate or candidates so nominated shall be deemed to be duly elected.

The Civil Commissioner in this case looked at the nomination paper and discovered that only one candidate had been nominated, and him he declared to be duly elected.

In Hitchcock's case the onus was on him. The 36th section enacts that no person not nominated

as aforesaid by five voters or upwards shall be eligible to be a candidate or to be elected as a councillor for any district of any division. Hitchcock was not nominated by five voters as required by the section and on that ground the Court ought not to interfere with the ruling of the Civil Commissioner.

The case of *Osterloh v. The Civil Commissioner of Caledon* was applicable.

The first application ought therefore to be granted, and the second refused.

Mr. Justice Upington concurred.

Mr. Schreiner, Q.C., asked for a special order that the Court would sanction costs being taxed for certain affidavits prepared by an agent in the country.

The Court granted this order.

[Applicants' Attorneys, Messrs. Van Zyl & Buissinne; Respondent's Attorney, Paul de Villiers.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, }
K.C.M.G. (Chief Justice), Mr. } 1893.
Justice BUCHANAN, and Mr. } Feb. 2nd.
Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

SOUTH AFRICAN ASSOCIATION V. MYBURGH.

Mr. Maskew moved for provisional sentence for £400, being the amount of a mortgage bond, with interest from May 1, 1892. The bond had become due by reason of the non-payment of interest.

Granted.

BAM V. BA AERTMAN.

Mr. Maskew moved for provisional sentence for £68, being the interest on a mortgage bond for £1,060 from January 1, 1892, at 6 per cent. Defendant asked for time until the 30th April.

Provisional sentence was granted, but the Court suggested to plaintiff to give defendant the time he asked for.

YAN NOORDEN V. ADAM.

Mr. Molteno moved for judgment in terms of a consent paper, signed by defendant's attorney.

The Court granted judgment.

GENERAL MOTIONS.

KEENAN V. KEENAN.

Mr. Sheil moved to make absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce.

The Court made the rule absolute.

In re STEYTLER'S PETITION.

Mr. Molteno moved for the sanction of the Court to the amendment of certain original subdivisional transfers of the farm Bordeaux.

The Court granted the order.

REGINA V. OHLSSON. { 1898.
Feb. 2nd.

Importer—Licence—Malt—Act 38 of 1887, section 2—Contravention—Conviction—Appeal.

A person, who annually imports £1,200 of malt or other ingredients to be used in the manufacture of beer sold in this country, is liable to an importer's licence under Act 38 of 1887.

The case of Regina v. Poppe (2 C.T.L.R., 393) commented upon and distinguished.

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate for Cape Town.

The appellant was charged with the crime of contravening section 2, Act 38 of 1887, in that upon or about the 4th February, 1892, and at or near Cape Town, the defendant did wrongfully and unlawfully, and in the name and on behalf of Ohlsson's Cape Breweries (Limited), import goods other than the produce of South Africa, to wit, malt, hops, saccharine, bottles, corks, and chemicals for the purpose of trade or barter, such importations being of the value of at least £1,200 sterling, during the year 1892, without the licence in that behalf required by law, thus rendering himself liable to the penalty imposed by section 2, Act 38 of 1887. The accused being arraigned pleaded not guilty; he was found guilty and sentenced to pay a fine of £1. From this sentence the present appeal was brought.

At the trial the accused admitted that his importations exceeded the amount mentioned in the Act. It was proved that the company, of which the defendant is managing director, takes out a joint-stock company's licence and a wholesale liquor licence.

Mr. Juta was heard in support of the appeal. He said that before the Act 38 of 1887 there were two licences—a retail and a wholesale. The Act of 1887 abolished both these licences. While these were in force a brewer was not bound to take out either licence, but only a wholesale liquor licence and a bottle licence. The Act of 1887 substituted importer's and general dealer's licence. A brewer pays a heavy licence, and it was never the intention of the Legislature to impose a cumulative licence on him. Again, the appellant does not trade in malt, the malt is merely imported for the purpose of being used in the manufacture of beer.

Mr. Giddy, for the Crown, referred to section 4 of the Act.

Mr. Juta replied.

The Chief Justice, in giving judgment, said: The first part of Mr. Juta's argument was conclusively answered by schedule 2 of the Act, which enacted that every importer should pay a licence of £12 over and above his licence as a general dealer, auctioneer, pawnbroker, or dealer in gunpowder, or any other licence he may hold. Then this view was confirmed by the fourth section, which referred to licensed dealers in intoxicating liquors, and when referring to the apothecary, chemist, or druggist, the fourth section enacted "that he shall not be bound or required to take out a licence as an importer of such goods as are used in the ordinary course of business of an apothecary, chemist, or druggist." If the Legislature had intended to exempt the licensed dealer in intoxicating liquors as well as the chemist and druggist, undoubtedly the Legislature had an opportunity of saying so. Therefore the first part of Mr. Juta's argument could not be sustained. In regard to the second part, counsel had admitted that malt to a greater amount than £1,200 had been imported; but contended that it had not been imported for the purposes of trade or barter. But considering that the articles traded in or bartered contained as an essential portion of them the things imported, surely the things imported were traded or bartered in. This was a very different case from the tins* holding the lobsters which the Court had to decide a few months ago. The Court held that it was not the tins that were traded in or bartered, but the lobsters contained in these tins, and that the lobsters had the same value as lobsters whether they were enclosed in tins or not. But it was very different in the case of beer. It would not be beer unless it contained malt, and therefore the malt might be said to be contained in the beer. If the beer was traded or bartered, then the malt which was contained in the beer was also traded or bartered. I therefore think that as an importer of

* Regina v. Poppe (2 C.T.L.R., 393.)

upwards of £1,200 of malt, the appellant must pay the duty as an importer, and for these reasons the appeal must be dismissed.

Their lordships concurred.

[Attorneys for the Appellant, Messrs. Fairbridge & Arderne.]

HAVENGA AND HERBST V. STEYN. { 1898.
Feb. 2nd.

Trespass—Damages—Exception—Act 20 of 1856, section 8, sub-section 3—Future rights—Jurisdiction—Exception upheld on appeal.

This was an appeal from a judgment of the late Resident Magistrate for Albert in an action in which the present respondent (plaintiff in the Court below) sued the defendants for £20 for trespass on the farm Kniffontein, and also for turning a certain stream of water which runs through plaintiff's property. The defendants excepted to the summons on the ground that the Court had no jurisdiction, inasmuch as future rights would be bound by the decision, Act 20 of 1856, section 8, sub-section 3. The defendants further stated that they were riparian owners of the stream of water referred to in the summons, and that they had had the use of the water for the last twenty-six years. That they were joint owners of the said stream of water, and disputed plaintiff's sole right to the same. The exception was overruled with costs. The defendants then pleaded the general issue.

The facts appear from the Magistrate's reasons, which were as follows: I find it proved by Mr. O. Lemue that there was a trespass on plaintiff's ground on the 18th and 19th November, 1892; that defendants turned the water from plaintiff's furrow, causing damage. This is confirmed by Jacobus Havenga, who only had permission to use water from plaintiff's furrow, the water being conveyed into and upon defendant's land by a shoot made by defendant Herbst and this witness. In this he is confirmed by the witness Aaron. J. L. Steyn found the water diverted on 18th and 19th November from plaintiff's furrow to defendants' land by being stopped from flowing into plaintiff's dam; that the female defendant admitted to him that she and Herbst had got the water for the last two months. The plaintiff put in a diagram of plaintiff's and defendants' property showing plaintiff's furrow and dam. The defendants called Mr. Fourie, who said that the water was got for the defendants' dam from the spruit or main watercourse in a furrow through plaintiff's land,

The witness Botman proved that plaintiff's furrow is still the same as he had used when he occupied the farm years ago, and that anyone taking water out of plaintiff's furrow trespassed on his ground. Stoffel Botha also proves that the shoot by which the water is brought on to defendants' land was made by defendant Herbst and Jacobus Havenga, and that he asked plaintiff for the use of the water to irrigate his land on the defendants' side of the farm by means of the iron shoot. None of the defendants' witnesses contradicted the fact of the trespass except the defendant Herbst, who gave Jacobus Havenga the lie, but says, "I cannot swear that the place where I take out my water is not in Lemue" (plaintiff's) farm." The fact of the trespass is wholly uncontradicted, and to my mind fully proved. It would seem that the occasion which led to plaintiff's water being taken was that the bed of the spruit or stream was washed out so deep at the spot where the defendants led from as would necessitate an expenditure of £8, hence they thought it cheaper to make the shoot and lead from plaintiff's furrow. As there was no serious attempt made to prove the extent of the damage, which according to defendants' witnesses appears trifling, I only gave nominal damages for £1, with costs. The case has unhappily been needlessly complicated by the defence. I consider the trespass fully proved.

From this judgment the defendants now appealed.

Mr. Schreiner, Q.C., was heard in support of the appeal, and contended that as important questions relating to the title to land were in dispute the Magistrate had no jurisdiction, and when he found what the matters in dispute really were he should have declined to determine them. "*Riversdale Divisional Council v. Riekaar*" (3 Juta, 252).

Mr. Graham was heard for the respondent.

The Chief Justice said the Court would remit the case to the Resident Magistrate's Court to take the evidence of a competent person, if possible a surveyor, upon the question whether there is more than one shoot, and if there is one shoot, whether it crosses the brak spruit above its junction with the main spruit, or crosses the main spruit below such junction.

Postea (March 18).

The Chief Justice said the Magistrate in this case had taken the evidence of the surveying engineer, Mr. Hanson, in accordance with instructions given by this Court. There need be no further argument on the matter—the Court would read the evidence and give judgment. His lordship read the evidence and said: It was quite clear from the surveyor's evidence that there was a *bona-fide* dispute between the parties as to the

boundary. The dispute was as to what constituted the main stream. According to the plaintiff, the main stream was what was called the braakspruit. According to defendant's evidence the main stream goes to the left of the braakspruit, and it was from this so-called main stream that defendant led water. It was clear therefore that the exception which was taken in the Magistrate's Court was a good one and the Magistrate ought to have allowed it. It was a *bona-fide* dispute between the parties whether the braakspruit or the main stream was the boundary. Independently of that point, the question was, what was the real boundary? The evidence given by the surveyor was clearly in favour of defendant. According to him the main stream joined the braakspruit at a considerable distance below the zinc shoot, and that was the main question. He appeared to be somewhat doubtful, but upon the whole he came to the conclusion that it joined the main stream below the zinc shoot. If that be so, then the main stream where the water was led off was really the boundary between the two properties, and there was no trespass. The Court would therefore allow the appeal with costs in this Court and in the Court below, and would alter the judgment of the Magistrate into one of absolute from the instance, with costs.

[Appellants' Attorney, G. Montgomery Walker; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

KORSTER V. BLAKE. { 1898.
Feb. 8rd.

Oral promise—Suretyship—Undertaking to repay advances made to another—Evidence.

There is no rule in the law of the Colony, as there is in the English law, that an action cannot be brought upon an oral promise to answer for the debt of another, but the evidence of such a promise must be clear and conclusive.

Equally clear evidence is required of a direct promise to repay advances to be made to another as the promisor's agent although such a promise is not required by English law to be in writing.

Mr. Searle appeared for the plaintiff, and Mr. Juta for the defendant.

This was an action instituted by the plaintiff, the proprietor of the Free State Hotel, Colesberg, against the defendant, the manager of the Equitable Life Assurance Society in the North-western districts of the Colony, for the sum of £80 12s. 8d., being the amount due to plaintiff for accommodation, forage, and goods supplied and cash advanced to one Van Es at the alleged special instance and request of the defendant. The defendant denied all knowledge of the debt, and alleged that no account had been furnished to him by the plaintiff.

Jacobus Peter Korster deposed that plaintiff was his nephew. Witness managed plaintiff's hotel. Knew the defendant. In May last year Mr. Van Es came to the Free State Hotel, in Colesberg, with a cart and two horses and a boy. He stayed five or six days. During his stay Mr. Blake arrived. He met Mr. Blake and brought him to the hotel. Mr. Blake was not pleased with the forage which the horses were receiving, and ordered them chaff and mealies. Subsequently, before Mr. Blake departed, he told witness to give Van Es anything he wanted—any money he wanted—and draw on him (Blake) for the amount. Van Es stayed for some weeks after travelling about the country and put up at the Free State Hotel. The bulk of the account was incurred after 25th May. All the goods were actually supplied, as well as the cash, £4 odd. Witness drew on Blake for amount of account. The draft was dishonoured. If he had not relied on the defendant's undertaking he would have retained the cart and horses until his account had been paid.

Cross-examined by Mr. Juta: He knew that Van Es was a sort of sub-agent travelling under Mr. Blake. When he stayed before at the house he had always paid his accounts.—Q. Is it not the case that Blake told you that if Van Es was short of money and drew on him (Blake) that you might cash the draft?—A. No, I was to draw on Blake.—Q. You knew that when Van Es was at your house that he was receiving money from Mr. Blake?—A. That is not my business.—Q. Look at that cheque (cheque from Blake to Van Es produced). Does it not bear your signature?—A. Yes, that's right; I endorsed it because I was known at the bank.

Wilhelm D. van Es, now a traveller for the New York Insurance Company, deposed that last May he was in the employ of Mr. Blake, of the Equitable. Knew Mr. Korster, of the Free State Hotel, Colesberg. Stayed there from the 6th May. Mr. Blake came upon the night of the 24th. He ordered the horses chaff and mealies. Witness asked Blake for some money. He said he had none, but he would see Mr. Korster. Mr. Korster came out and Mr. Blake said to him: Korster,

supply Van Es with cash and anything he wants, and draw on me." Witness went to Hanover and resigned his situation on 31st July. Had some dispute with Blake as to money, and had not yet been settled with. Blake owed witness £21.

Cross-examined: His salary was £15 a month, £20 allowance for expenses, and 5 per cent. commission on all premiums. If the expenses exceeded £20 per month witness was liable for the amount in excess. Witness was in the habit of receiving cheques. On 6th June he received a cheque for £5, and Mrs. Van Es drew upon Mr. Blake in Cape Town. On the 4th July he received a cheque for £10. During the month he was credited with full salary and expenses.—Q. Do you mean to tell the Court that after you had been credited with your full salary and expenses and commission that you expected Mr. Blake to pay Korster's account?—A. Yes, after the arrangement he had made.—Q. Do you say that he was not to be paid back this amount, even if he had paid Korster's account?—A. Not that I am aware of.—Q. Do you mean seriously that you were to have unlimited credit at Korster's as long as you remained in the district, and at the time you were working the business at a loss, which was the reason you were dismissed?—A. I was not dismissed. I resigned on account of the draft being dishonoured.

Johannes Kleynhans, groom in the employment of Mr. Blake, remembered the conversation between Blake and Van Es, when the former said Mr. Korster was to supply Mr. Van Es with anything he wanted and he (Mr. Blake) would stand good for the consequences.

Cross-examined: The conversation was strictly about money, and Mr. Blake said he had none, but if Mr. Korster would give Van Es some he would stand good for it.

For the defence, Selfred Walter Blake, defendant, deposed that he was district manager of the Equitable Life Assurance Company and Van Es a sub-agent. When he left for Colesberg Van Es got a cheque for travelling expenses. Witness visited Colesberg a few days afterwards. Saw Van Es there. Just as he was going on to the cart to drive to the station Van Es said he was short of money as his cheque had not arrived. Witness gave him a few pounds and said to him, "If the cheque does not arrive by the time you are ready to leave, then draw on me for the usual amount," and witness told Korster, who was standing by, to cash it. He said nothing to Korster to lead him to believe that he was to give Van Es accommodation *ad lib*. Had he known anything about Korster's bill he would not have continued sending cheques to Van Es, who, while he was at Korster's, received £25 in cash, exclusive of salary.

After hearing counsel,

The Chief Justice said: By our law, differing in

this respect from the law of England, an action may be brought on a promise to answer for the debt of another, even although the agreement containing such promise be not in writing.

But, as in actions to enforce contracts for the sale of land, clear and conclusive evidence of the promise is required.

If the contract is one of suretyship or guarantee, all the incidents peculiar to that species of contract would apply whether it be in writing or not. The claim in the present case, however, is not founded upon a promise to answer for the debt of another, but upon a direct undertaking to repay advances made to another as the defendant's agent.

Such a promise although not required, even by the English law, to be in writing should, in my opinion, be proved by as clear evidence as if the contract relied upon had been one of suretyship.

After hearing all the evidence I am satisfied that the defendant's memory has failed him as to the actual nature of the undertaking given by him. His version now is that he authorised Van Es to draw upon him, and that the only promise he made to the plaintiff was that he would pay drafts so drawn by Van Es and cashed by the plaintiff, but this version is at variance with the defendant's whole course of conduct, and with the rest of the evidence given in this case. [After commenting upon the evidence given by the different witnesses the Chief Justice added] The Court has no concern with the state of accounts between the defendant and Van Es.

The plaintiff, having supplied board and lodging and made advances to Van Es upon defendant's distinct promise to meet a draft drawn upon the defendant for the amount, is entitled to judgment with costs.

Their lordships concurred.

[Plaintiff's Attorney, C. C. de Villiers; Defendant's Attorneys, Messrs. Fairbridge & Arderne.]

SNEIGH V. SNEIGH.

On the motion of Mr. Graham, a rule nisi was granted calling upon defendant to shew cause why plaintiff should not be allowed to sue in *forma pauperis* in an action for divorce. The rule to be returnable on Thursday next.

In re VAN DER HOEVER'S PETITION.

Mr. Juta moved for an interdict restraining the Deputy Sheriff for Albert from selling a cart seized by him whilst under pledge to the petitioner, pending an action to be brought by petitioner.

The Chief Justice said it was only because there had been some high-handed proceedings on the part of the Deputy Sheriff that the Court would

grant the rule. The Court, however, would grant a rule calling upon Mr. Andrews, Deputy Sheriff of Albert, to shew cause why he should not be restrained from selling the cart pending an action to be brought by applicant against the Deputy Sheriff for restoration of the cart, or payment of its value, the rule to be returnable on Thursday week.

BIDDULPH V. YATES. { 1893.
Feb. 3rd
& 7th.

Principal and agent—Account—Summons in Magistrate's Court—Exception—Obligation to explain deficiency.

A summons in a Magistrate's Court alleged in substance, although in inartistic language, that the defendant, as manager of the plaintiff's business at L., had accepted as correct certain stocklists of goods supplied by the plaintiff to and found by him in the place of business and that a comparison of these lists with the defendant's accounts of goods sold showed a certain deficiency unaccounted for.

Held, that, in an action brought for the amount of the deficiency, an exception to the summons, that it disclosed no ground of action inasmuch as it did not allege that the loss was due to fraud or carelessness, had been properly overruled by the Magistrate.

Assuming the statements in the summons to be correct, the obligation to explain how the deficiency occurred lay upon the defendant as the person entrusted with the custody of the goods and the management of the business.

Failing such explanation the defendant held liable to account for and pay the deficiency.

This was an appeal from a judgment of the Acting Resident Magistrate for Mount Frere in an action in which the respondent (plaintiff in the lower Court) sued the defendant (present appellant) for £289 1s. 4d.

The summons alleged :

1. That the plaintiff did on or about the 14th January, 1891, engage the defendant to manage and conduct the branch mercantile business of plaintiff at Lady Kok, in the district of Mount Frere.

2. That defendant agreed to manage and conduct the said business, in consideration whereof

plaintiff agreed to pay him the sum of £10 per month.

3. It was also agreed between plaintiff and defendant that the latter should adopt the management thereof from the period beginning on the 6th December, 1890.

4. Defendant took over the management of the said business from the 6th December, 1890, in pursuance of the said agreement.

5. Plaintiff during the said period caused stock of the said business to be taken in presence of, and with the assistance of, defendant and stock sheets so framed have frequently been in defendant's possession, and he always had, and still has, access thereto, as well as to the plaintiff's own books relative to the said business.

6. In the month of June, 1892, plaintiff ascertained upon such stock-taking aforesaid that defendant was deficient in the sum of £289 1s 4d in respect of the value of goods received by him from plaintiff in regard to the said business, and which deficiency is shown by the annexed account.

7. Defendant has wholly failed and neglected to account for the said deficiency of £289 1s 4d. Wherefore the plaintiff prays that defendant may be adjudged to pay him the said sum of £289 1s 4d with costs of suit.

The defendant excepted to the summons on the ground that it disclosed no cause of action, inasmuch as it was not alleged therein that the loss complained of was due to fraud or gross carelessness, or that the defendant had appropriated to his own use any property belonging to the plaintiff.

The exception was overruled.

The defendant then took a second exception to the summons, on the grounds that it was vague and that he was prejudiced in his defence, inasmuch as the half-yearly stock sheets of 6th December, 1890, 30th June, 1890, 22nd December, 1891, and 24th June, 1892, had not been annexed to the account, nor the list of book debts charged to the business on 6th December, 1890, by reason of which omission defendant could not test the accuracy of the account annexed to the summons.

This exception was overruled, but the case was proposed to be adjourned in order that the defendant's attorney might go through the stock sheets, which plaintiff was ordered to furnish at once. This offer was not accepted, as the stock sheets were all alleged to be too voluminous to be properly investigated within the time allowed.

The defendant then put in his plea, he admitted all the allegations in the summons down to the word defendant in paragraph 5, and denied the remaining paragraphs. He also pleaded the general issue.

Evidence having been taken, in the course of which defendant alleged that the causes of the deficiency were his having taken over the stock at

too high a value, that the expenses of the station were too great, that he had not been credited with them, nor with his salary, which amounted to more than £280. Judgment was given for plaintiff for £200 with costs, the Magistrate stating in his reasons that the defendant had wholly failed to give a satisfactory explanation of the large deficiency. From that judgment the defendant now appealed.

Mr. Searle was heard in support of the appeal, and contended that the first exception taken was good and should have been sustained.

It was impossible to tell from the summons whether the defendant had been sued on contract or in tort; it was vague, and judgment could not be given on it in its present form.

Mr. Juta was heard on the exception.

The Court decided to go into the merits before deciding on the exception.

The record having been read, and Mr. Searle heard on the merits,

The Chief Justice intimated that the Court would read the evidence in the case before saying whether they wished to hear Mr. Juta.

Postea (February 7th.)

The Court delivered judgment.

The Chief Justice said: The summons in the Court below was inartistically worded but its meaning is reasonably clear. Read by the light of the account annexed, it alleged in substance that the defendant, as manager of plaintiff's business at Lady Kok, had accepted as correct certain stocklists of goods supplied by the plaintiff to and found by him in the place of business, and that when these stocklists are compared with the account kept by the defendant of goods sold by him there is a deficiency unaccounted for of £289 1s. 4d. The exception was taken in the Court below that the summons disclosed no cause of action—inasmuch as it does not charge the defendant either with negligence or with fraud, but such an allegation is not essential to the plaintiff's right of action. If, according to the accounts supplied to the defendant and accepted by him on the one side, and the accounts kept by him on the other, there is a balance to his debit, he is *prima facie* liable for the amount, and there is no obligation upon the plaintiff to explain how the deficiency occurred. This obligation rests upon the defendant as the person intrusted with the custody of the goods and the management of the business. He may plead that the accounts were wrongly stated, or that goods had been sold by him at prices lower than those appearing on the stocklists or that they had been lost without any negligence or fraud on his part, but he cannot object to the plaintiff's summons on the ground that it does not allege fraud or negligence.

His duty to account for and pay the deficiency can only be discharged by a satisfactory explanation as to the cause of the deficiency. The Magistrate, therefore, properly overruled the exception.

It is evident from the defence raised on the merits that the defendant fully understood the nature of the claim. The defence was, in effect, that the deficiency was caused partly by a mistake in the original stocklist of goods supplied to the business and partly by his having been obliged to sell many of the goods at less than the stocklist prices. The Magistrate found that in this way the defendant had accounted for a deficiency of about £80, but not for the balance of £200, and for this latter amount he gave judgment with costs. After carefully considering the evidence, I am unable to say that the conclusion was wrong and the appeal must therefore be dismissed with costs.

Mr. Juta reminded their lordships that when this case first came before the Court the question was raised whether the time allowed for appeal by the rules of this colony should apply also to the Transkei.* Their lordships had ordered the Magistrate to send up the records, and also stated that as the question raised was somewhat dubious the question of costs could stand over in the meantime. He now asked for the decision of the Bench on this question of costs.

Mr. Searle contended that they should have the costs of that application, although they might lose the costs of appeal.

The Chief Justice remarked that if this were such a frivolous appeal that there was no justification for it, he should certainly have ordered the appellant to pay the cost of the original application as well. But he was unwilling to say that the appeal was so entirely frivolous. There was a great deal to be said on behalf of appellant with regard to the form of the summons, and he thought respondent ought to suffer for the manner in which the summons had been drawn. The respondent had put appellant to more expense than he was justified in doing. In this case the appellant was put to a deal of unnecessary expense by the refusal of the Magistrate to send up the record, and in this refusal he was backed up by the respondent. Therefore while dismissing this appeal with costs, the Court must give the costs of the original application, ordering the record to be sent to the Supreme Court, against the respondent Yates.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Findlay & Tait.]

* *Vide* "Biddulph v. Yates" (2 C.T.L.R., 387)

MOORCROFT V. STONE. { 1898.
Feb. 7th.

Act No. 9 of 1889—Lottery—Game of chance—Shooting match—Summons.

A shooting match at which the competitors contribute to a fund from which prizes are awarded to the successful competitors is not a lottery in terms of section 3 of Act No. 9 of 1889.

A contribution made to the fund on behalf of a competitor can be recovered from him by the person who made the advance.

The fact that no money was actually paid into a separate fund by the plaintiff would be no bar to an action for money advanced on behalf of the defendant, where the plaintiff had supplied the prizes to the full value of the contributions, and the defendant had requested the plaintiff to make the contribution for him with full knowledge of all the circumstances.

This was an appeal from a judgment of the Resident Magistrate for Hay in an action in which the respondent (plaintiff in the lower Court) sued the defendant (present appellant) for £4 15s., being an account for goods sold and delivered and cash advanced to defendant at his special instance and request.

At the trial the plaintiff gave the following evidence: I reside at Uitwater, in the district of Hay. I am the plaintiff in this case. I know the defendant; I have had certain transactions with him. I produce my day-book, and there find—5th April, 1892—one pair of carriage bits, 12s. 6d.; one bucket of mealies, 2s. 6d.; eight sheep at 10s.; cash, £4. £4 15s. On the 5th or 6th April, 1892, there was a shooting match at Uitwater, the tickets were some £1 and some 10s. each. Defendant took tickets to the amount of £4. He asked me to advance him the £4, as he had no money, and that when he got home he would send me £4, or eight fat sheep of the value of £4, as I was buying sheep at the time. At the same time he said that I should send him a specified account, as he had stayed there and had had board and lodging. I sent him the specified account on April 22. He did not reply to that, but after I had instructed my attorney to take proceedings against him, he wrote me the letter produced, marked "A." (In this letter defendant alleged that he had paid for two of the tickets by giving plaintiff a £10 note, from which he took £2, and returned the balance, and that one Mr. Jan Smijt had promised in plaintiff's presence

to pay for the other two.) I did not charge him for accommodation. Mr. Moorcroft did not give me a £10 note.—Cross-examined: The account produced, marked "B," is the one I sent defendant. The £4 was advanced on the 5th. On the 22nd I charged the £4 to defendant, as he had not settled. The prizes were two sets of harness, cash, &c. Defendant took about £10 in prizes. Mr. Green called the shooting match. He is my clerk. Some of the prizes came out of my shop. I did not hand the £4 to defendant. There is a list of tickets on the table, people come in and pick same. After the shooting, if they have no money, they ask me to advance it and I do so. The shooting match is a private thing out of the business. A good many farmers pay cash down to Mr. Green, acting on my behalf. I did not know that defendant came without money. The tickets were issued to defendant without his paying cash for them. There is a target on my farm. I started business at Uitwater about fifteen months ago.

Re-examined: As a matter of fact no tickets were issued. This was on the 5th or 6th of April. On the 22nd April I paid £4 out of the business to the credit of the shooting match on behalf of the defendant. After the match was over defendant asked me to pay the £4 and send him an account, as he had to settle for other things.

By the Court: The sum of £4 was debited to defendant on 22nd April, 1892, in the day-book, and in the ledger on the same date.

The defendant's agent at this stage tenders 15s. and asks for absolution from the instance on the remainder of the account.

This the Court refused.

The defendant then gave evidence. He denied owing the plaintiff £4 15s., but admitted that he owed him £2 15s. He also qualified certain statements made in his letter above referred to.

The defendant's attorney contended that plaintiff's claim could not be entertained inasmuch as the shooting match held at Uitwater on the 5th April, 1892, was a lottery in contravention of Act 9 of 1889. He laid particular stress on the words contained in section 3 of the Act, "lot, dice, or any other mode of chance," and urged that shooting for prizes must be taken to be included in the words, "or any other mode of chance."

The Magistrate gave judgment for the plaintiff for the amount claimed with costs. He stated in his reasons that he took the words "or any other mode of chance" to be of the same nature as the two preceding words, "lots and dice," and that a shooting match for prizes which involves a trial of skill was not a lottery within the meaning of Act 9 of 1889.

The defendant now appealed.

Mr. Searle was heard in support of the appeal, and contended that the summons was faulty as

the evidence showed that no cash had been advanced by plaintiff to defendant, the summons should have been amended. He also contended that the shooting match was illegal within section 8, Act 9 of 1889. He cited "Day v. Cloete" (6 Juta, 189), "Hedgson v. Terrill" (1 C. & M., 797), and "Tollett v. Thomas" (6 L.R.Q.B., 514).

Mr. Graham, for the respondent, was not called upon.

The Chief Justice said: I quite agree with the Magistrate that shooting matches such as the one in question constitute a healthy, useful and innocent mode of recreation, especially for farmers, to whom many other forms of amusement are practically denied. The claim in the Court below was to recover money advanced on behalf of the defendant to enable him to pay for the right of competing at a match, and the main defence was that the match was illegal as being a lottery in terms of the third section of Act No. 9 of 1889. Unless the prizes competed for were to be gained "by lot, dice, or any other mode of chance," the match was not a lottery in terms of the Act. There is certainly very little chance involved in success at a rifle shooting match. An occasional good shot might be made by chance only but in the result the prizes would only be obtained by the most skilled performers. The fact that an artificial rest was used might perhaps have slightly diminished the skill required, but still the match was a trial of skill and not a game of chance. The Magistrate therefore properly overruled the defence.

The second objection relates to the form of summons. The claim is for money advanced on behalf of the defendant, and inasmuch as no money was actually handed over to anyone by the plaintiff, it is contended that the action ought to have been dismissed. But the evidence shows that all the parties to the competition, including the defendant, understood that the match was not got up by the plaintiff as part of his ordinary business, which was that of storekeeper. The arrangement was that the amount of the contributions was to be devoted to the purchase of prizes from the plaintiff's store, and that those contributions were to be made to a fund outside the business. The defendant not having sufficient cash, and having full knowledge of all the circumstances, requested the plaintiff to make the contribution to the fund for him, and although no money was actually paid by the plaintiff, the defendant (who obtained prizes to the value of £10) acquired the same rights which he would have had if there had been an actual handing over of the money to a separate fund, and is barred by his own consent to the arrangement from raising the present objection to the form of summons. The appeal must therefore be dismissed with costs.

Their lordships concurred.

[Appellant's Attorney, G. Montgomery Walker; Respondent's Attorney, Gas Trollip.]

STUURMAN AND TWAISHA V. VAN ROOYEN. 1898. Feb. 7th.

Pounds—Act No. 15 of 1892—Caretaker—Trespass money—Tender of—Illegal impounding—Damages.

The plaintiff's cattle having been taken to the defendants' kraal for the purpose of being sent to the pound for trespass on the defendants' land, the plaintiff not finding the defendants at the kraal offered to the herd in charge the amount of trespass money lawfully payable, which the herd refused as insufficient.

On the defendants' return they were informed of the tender but impounded the cattle.

Held, that even if the herd was not a "caretaker" in terms of the 27th section of Act 15 of 1892, the defendants were not justified in impounding the cattle without first offering to the plaintiff to accept the tender and deliver back the cattle.

On an appeal against a judgment for damages for a deliberate delict or tort the Court does not scrutinize the evidence in support of damages so closely as in actions for breach of contract involving no turpitude on the defendants' part.

This was an appeal from a judgment of the Resident Magistrate for Glen Grey in an action in which the present respondent (plaintiff in the Court below) sued the appellants (defendants in the Court below) for £10 damages, alleged to have been sustained by reason of defendants having wrongfully impounded thirty-nine head of cattle belonging to the plaintiff after the latter had tendered, as trespass money, the sum of 18s. to one Diamond, who, it was alleged, was acting for and on behalf of the defendants, and who refused to accept the amount tendered.

From the evidence given by the plaintiff at the trial it appeared that on the 7th November last his herd reported that a number of his (plaintiff's) cattle had been taken to the defendants' kraal for trespassing. Plaintiff rode up to the defendants' kraal to release his cattle, but on his arrival found that the defendants were not there. He saw, however, one Diamond, a herd, and asked him what he had to pay for the cattle. Diamond replied 4d. a head for the cattle and 10s. for each

bull (there were four bull calves amongst the cattle seized, all under twelve months old). Plaintiff then counted the cattle, there were thirty-nine, including the bulls, and said he could not pay 10s. for the bulls, because they were calves, but that he would pay 4d. a head, in all 18s., which amount he tendered. Diamond would not take the money or give up the cattle. Plaintiff then asked him to give up the cattle, to keep the bull calves and take them to the pound, and if the poundmaster said they were bulls he would pay for them as such, but that in the meantime he would pay the 18s. at the rate of 4d. a head trespass money for all the cattle. As Diamond would not take the money plaintiff went home, and about four p.m. on the same day saw the cattle being driven in the direction of the pound. Amongst the cattle were two cows and two heifers belonging to one Lewis Jordan, who released his cattle as well as eight cows belonging to the plaintiff. The plaintiff afterwards went to the pound, a distance of twenty-six miles from his farm, and released the remaining twenty-seven, paying under protest the sum of £1 11s. 2d.

The defendants, in their evidence, denied that they had authorised Diamond to impound stock, or that they had given him any authority over their kraal.

The Magistrate gave judgment in favour of the plaintiff for the amount claimed with costs, the following being his reasons:

According to the evidence there was no actual caretaker of the kraal, therefore it was impossible to have tendered money to a caretaker, but the plaintiff, I consider, did all that was necessary under the circumstances. He tendered 4d. a head trespass, which was the amount due to the defendants, which amount was refused by the responsible people of the kraal, and therefore I consider plaintiff is entitled to a judgment as prayed with costs. Plaintiff to have his witness's expenses.

From this judgment the defendants now appealed.

Mr. Juta was heard in support of the appeal. He referred to Act 15 of 1892, section 27, and contended that Diamond, to whom the tender of 18s. had been made, was not a "caretaker" within the meaning of that section. If the Court were against him on that point, then the damages awarded were clearly excessive. The plaintiff had given no proof of damages beyond the £1 11s. 2d. paid for releasing his cattle.

Mr. Sheil was heard for the respondent. On the question of damages, he referred to the 72nd section of Act 15 of 1892.

Mr. Juta replied.

The Chief Justice said: The first objection taken to the judgment is that it is based upon the assumption that the person to whom the plaintiff had tendered the trespass money was the defend-

dants' "caretaker" within the meaning of the 27th section of Act 15 of 1892. The plaintiff might fairly have regarded Diamond as the person left in charge of their place and cattle and therefore as a caretaker, but I will assume that Diamond was not a "caretaker" in the strict sense of the word. The fact still remains that after the defendants had been informed by Diamond of the tender, which was admittedly sufficient, they sent the plaintiff's cattle to the pound.

If they did not choose to have a responsible caretaker on their place it was, at all events, their duty, before impounding the cattle, to send word to the plaintiff, who lived near to them, that they were willing to accept the trespass money offered.

The plaintiff is therefore clearly entitled to damages for the illegal impounding.

The second objection to the judgment is that excessive damages have been awarded. It is true that the plaintiff's witnesses entered into no details as to the damages sustained by him, but they stated certain broad facts which justified the Magistrate in awarding £10 as damages. The cattle had been driven a distance of twenty-six miles to the pound. They had to be driven back all that distance and the plaintiff was put to all the trouble, expense, and inconvenience of going all that distance and releasing them from the pound.

It is urged upon this Court that there is no proof of the plaintiff having to go specially for the cattle, and that he may have made the journey for other purposes as well. His witnesses were not cross-examined upon this point, and we may fairly assume, in the absence of evidence to the contrary, that his object in making the journey was to release the cattle.

Certainly whatever may be the practice in actions for breach of contract involving no turpitude on the part of the defendant, the Court has not been in the habit of scrutinising too closely the evidence in support of damages for a deliberate delict or tort.

Besides the damages, costs and charges arising out of an illegal impounding the owner is entitled, under the 72nd section, to special damage in respect of each animal. If all the items are added together, the lump sum of £10 appears to me to be by no means excessive.

The appeal must be dismissed with costs.

Their lordships concurred.

[Appellants' Attorneys, Messrs. Findlay & Tait; Respondent's Attorney, John Ayliff.]

REGINA V. BEN CECIL AND SOBHAI. { 1893.
Feb. 7th.

On the application of Mr. Giddy, the venue in these cases was changed from the Supreme Court to the next Circuit Court to be held at Uitenhage.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 1892.
K.C.M.G. (Chief Justice), Mr. { Feb. 9th.
Justice BUCHANAN, and Mr. {
Justice UPINGTON, K.C.M.G.]

REHABILITATIONS.

On motion from the Bar, the following insolvents were granted their rehabilitation: Louisa Heusden, the surviving spouse of Wilhelmus van Heusden; Ernest Johannes J. Grundlingh.

PROVISIONAL ROLL.

BLAKE V. VAN BENSBERG.

Mr. Maskew moved for provisional sentence upon a promissory note for £18 19s. 2d. with interest at 6 per cent. from 2nd August, 1892.

Granted.

SEDGWICK V. MYBURGH.

Mr. Castens moved for judgment under rule 829 for £85 9d. 2d.

Granted.

GORDON MITCHELL AND CO. V. THEUNISSEN.

Mr. Rubie moved for judgment under rule 829 for £49 10s.

Granted.

GENERAL MOTIONS.

In re SLATER'S ANTE-NUPTIAL CONTRACT. { 1892.
{ Feb. 9th.

Ante-nuptial contract — Trustees — Life Policy—Application for leave to cede—No order made by Court.

Mr. Thorne moved for leave to the trustees under the contract to raise a loan of £190, at 6 per cent. interest, by cession and pledge of policy No. 8,577 for £500 in the South African Mutual Society (together with policy No. 8,945 for £500 in the same society), as security for repayment of the above-mentioned loan.

Under the contract the petitioners were appointed and accepted the position of trustees in respect of the policy No. 8,577.

It was provided in the contract with reference to the said policy that in the event of Mrs. Slater

surviving her husband she should enjoy the yearly interest arising from the investment of the proceeds payable under the said policy, and upon her death, or in the event of her predeceasing her husband, the capital sum arising from the said policy should be paid and appropriated in such manner and under such provisions and limitations as Mr. Slater and his wife should, by their mutual last will, or other instrument in writing, direct and appoint. In the event, however, of the wife predeceasing her husband without leaving issue, or should any portion of the proceeds to arise from the said policy remain undealt with as aforesaid, then the whole of the said policy, or the unappropriated portion as the case might be, should be re-transferred and re-assigned to Mr. Slater by the trustees.

No power was, however, given to the trustees to cede or assign the policy except under the circumstances above detailed.

Seven children were born of the marriage, all minors at the date of the petition.

The Court made no order.

The Chief Justice said: If the minors had been interested there would have been need to apply to the Court for an order, but seeing that the minors are not interested, and that the parties to the contract and the trustees had consented, there was no necessity to apply to the Court. But even if the minors had been interested the Court would not have authorised a loan which was intended for speculative schemes.

[Applicants' Attorneys, Messrs. J. & H. Reid & Nephew.]

SMIT V. SMIT. { 1892.
{ Feb. 9th.

Mr. Shell moved for a decree of divorce dissolving the marriage between the parties by reason of the defendant's failure to obey the order of Court granted on the 19th December last.

The Court made the rule nisi absolute dissolving the marriage.

Ex parte SPAAN.

This was an application for the appointment of examiners to inquire into petitioner's qualifications to be admitted as a translator of the English and Dutch languages to the Supreme Court.

The Court appointed Rev. H. Müller and Rev. Pelser examiners.

In re MULLER'S ESTATE.

Mr. Juta moved for authority to the Registrar of Deeds to cancel certain mortgage bond for £800 passed in favour of the said Muller by Johannes A. Neethling on a consent signed by two

executors of the estate, the remaining executor having left the Colony many years ago and not been heard of since.

The Court made the order.

In re ESTATE OF REDLINGHUY. — { 1898.
Ex parte BARRY. { Feb. 9th.

Insolvency—Trustee—Removal—Ordinance 6 of 1843, section 52.

It appeared from the applicant's petition that Redlinghuys surrendered his estate as insolvent on the 31st May, 1882.

That afterwards the petitioner and one Julius Ancher were appointed the joint trustees in the said estate.

That on the 12th August, 1883, the first and final account in the said estate was duly confirmed by order of Court.

That by virtue of certain sales of portions of the farms De Kango and Stephanus Kloof by the insolvent previous to his surrender, transfer had not been passed to the purchasers.

That the petitioner as co-trustee in the said insolvent estate had been called upon to execute and complete the necessary powers and documents to give effect to the said sales and pass transfer to the said purchasers.

That petitioner's co-trustee was not now in the colony, he being, as petitioner was informed, in Hamburg, Germany.

Wherefore the petitioner prayed for an order:

1. Authorising him to sign and execute the said powers and documents for and on behalf of the co-trustee, so that the transfers to which the said purchasers were entitled might be passed to them, or,

2. That the said Julius Ancher might be removed from the said trust to enable petitioner to complete the necessary transfers above referred to.

Mr. Searle was heard in support of the petition, he referred to section 52, Ordinance 6 of 1843 and to "*In re* Lategan's Estate" (20 T.L.R., 120)."

The Court granted an order removing Mr. Ancher from his office as trustee.

SNEIGH V. SNEIGH.

Mr. Graham moved to make absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

Granted.

PETITION OF C. H. E. HAUPT.

Mr. Joubert moved for the attachment of two lots of land on the Cape Flats to found jurisdiction in an action against Richard Karsten for recovery on a mortgage bond.

The Court granted leave to sue by edictal citation, returnable on the last day of term; personal service to be effected.

In re DE BOER'S ESTATE.—Ex parte { 1898.
DIRK JOHANNES. { Feb. 9th

Mr. Tredgold moved for leave to the petitioner, as guardian of his minor child Magdalena Johannes, to exchange a certain piece of ground belonging to the minor under the will of Keesviets de Boer for another piece that had been offered. The land belonging to the minor was part of an erf in the location of Welledale, Stockenström, and was valued at £150, being nearly four morgen in extent. The land offered in exchange was valued at £200, and was nearly five morgen in extent, being Erfs Nos. 4 and 5, in the location of Bergman's Hoek. The Master reported that the exchange appeared to be clearly for the benefit of the minor.

The Court granted the necessary authority, and further authorised the petitioner, if such were found necessary, to mortgage the property of the minor to pay the transfer dues and the cost of this application.

ALBERTS V. KAPLAN. { 1898.
{ Feb. 9th.

Fire policy—Payment—Interdict.

The Court granted an interdict restraining a Fire Insurance Company from paying the amount of a fire policy to the insured, against whom allegations of fraud and of intention to abscond were made on affidavit, pending the appointment of a trustee in the deponent's insolvent estate, and an action to be instituted by him against the insured.

Mr. Schreiner, Q.C., for applicant, moved that the rule nisi granted on the 4th January last, restraining the payment to respondent of the amount of a fire policy pending the appointment of a trustee in applicant's insolvent estate, might be made absolute. The affidavit upon which the rule nisi was granted was in the following terms:

Gezina Maria Alberts, the above-named applicant, maketh oath and saith:

1. That she is a widow with seven children, five of whom are minors, and that she resides on the farm Buffeljagtsfontein, in the division of Oudtshoorn, and that the respondent, Asner Kaplan, is a

general storekeeper and feather buyer, at present residing at Oudtshoorn.

2. That the respondent carried on a country business on the farm Welbedacht, in the aforesaid division, and that up to the month of November last, 1892, deponent dealt with the said respondent.

3. That in or about that time it was represented by respondent to deponent that she (applicant) was indebted to him in the sum of about £115 sterling, shop account, &c., and that he required security for that amount to obviate legal proceedings against deponent.

4. That deponent stated that the only security she could give was a bond on certain undefined shares of landed property coming due to her out of the estate of her late father Hendrik Everhardus Grundeling, but that having other creditors as well, she was afraid that as soon as it became known that a mortgage bond was registered against her those creditors would immediately press her for payment.

5. That thereupon respondent arranged with deponent that a bond should be effected and passed including all her liabilities, amounting in the aggregate to about the sum of £240 sterling on the respondent's undertaking to arrange with and pay out the other creditors.

6. That thereupon, acting in good faith, deponent was induced by respondent to sign a power of attorney embodying the terms of the said bond to be passed.

7. That subsequently, to wit, in the month of November, 1892, the bond was duly passed, when deponent discovered (as she alleged) that she had been grossly defrauded by the respondent, who procured the passing of the said bond for an amount of £545 sterling.

8. That since the passing of the said bond deponent has been sued by the other creditors, to whom respondent has failed to make payment as per agreement, and all her movable property has been sold at enormous sacrifices by execution.

9. That with the object of defeating the ends of justice, the said respondent has since, to wit December, 1892, ceded and sold the said bond for the sum of £400 sterling.

10. That seeing that she is utterly ruined, and to avoid the costs and expense of further suits, deponent was compelled to surrender her estate, and has this 29th day of December, 1892 (the date of the petition), signed her schedules, which will be lodged in the Resident Magistrate's Court the 4th January, 1893, for inspection.

11. That deponent is anxious that the trustee to be appointed in her insolvent estate should seek redress on her behalf as well as on behalf of the other creditors.

12. Deponent further says that the stock-in-trade of the said respondent was insured for the sum

£500 sterling with the Equitable Fire Insurance and Trust Company, Cape Town, and that on Saturday night, December 24, the said stock-in-trade was totally destroyed by fire, and that the said respondent has already applied for his insurance, which has not been paid out yet, but will probably soon be on compliance with certain formalities.

13. Deponent lastly respectfully submits to this honourable Court that she is entitled to an order restraining the secretary of the aforesaid Fire Insurance Company from paying out the said sum pending the appointment of a trustee to her insolvent estate, and an action to be instituted by him for the alleged illegal acts, as respondent keeps no other attachable assets, and deponent has every reason to believe that respondent will abscond as soon as the said insurance money is paid out.

After the rule had been granted the respondent filed an affidavit, in which he denied that he had agreed to pay £240 to applicant's other creditors, as alleged by her.

He alleged that the bond referred to by applicant had been voluntarily passed by her, and that she had, in the presence of Mr. Attorney Lind, of Oudtshoorn, admitted that she was indebted to respondent in the sum of £545.

That he (respondent) had openly, and in the presence of Mr. Lind and Mr. Cairncross, sold the bond in question to Messrs. Levin, Murick, & Hotz for £400. He further stated that there was no occasion for him to abscond, as alleged by applicant in the latter's part of her affidavit. He alleged that applicant was indebted to him in and above the £115 referred to in her affidavit in the following sums: £890 cash advanced, £30 interest, £10 further advance required by applicant, making in all £545.

Several lengthy affidavits were filed in answer to the respondent's, in one of which the applicant alleged that at the time she signed the documents referred to by the respondent she was engaged to be married to him, and that she was persuaded and induced to sign those papers.

Mr. Searle was heard for the respondent, and contended that the applicant was in her last affidavit seeking to set up quite a different case to that made out by her in her affidavit upon which the rule nisi had been granted. In that affidavit she ought to have entered fully into all the facts, *vide* "Lind v. King v. Calitz and Others" (2 C.T.L.R., 121).

Mr. Schreiner, Q.C., was not called upon.

The Chief Justice said he adhered to the rule which the Court had on several occasions expressed that upon an *ex-parte* application it was the duty of the applicant to inform the Court of all the material facts which might induce the Court to withhold the order. In the present case, the facts

which had been withheld so far from inducing the Court to withhold the order would have been an additional reason why the Court would have granted it. The special circumstances of the case showed why applicant did not upon her first application state all the facts. He could quite understand that she would have wished to obtain a remedy without discussing her domestic arrangements with the respondent; but being pushed to it, after hearing the affidavits on behalf of respondent, she was obliged to come out with all the circumstances. Therefore the mere fact that at the time she concealed the fact of her engagement ought not now to induce the Court to withhold the order. It was unnecessary to enter into details at this stage. They would keep their minds open for the trial which might afterwards take place. But this much, at all events, he (the Chief Justice) was bound to say, that if the affidavits now made on behalf of the applicant were true, they disclosed a case of the grossest possible fraud on the part of the respondent. The explanations given by the respondent appeared to be exceedingly lame. After he knew of this charge of fraud it was his duty to have given a satisfactory explanation as to how this sum of £545 was made up. He ought to have given some details. Instead of that, he gave no details whatever. In the body of his affidavit he merely said there was the sum of £390 owing for cash advances. There was an allegation also in the applicant's affidavit that if the respondent was allowed to receive this money from the Equitable Insurance Company, he was sure to abscond. The only answer to that was that respondent had no occasion or necessity to abscond. There was no direct denial that he would abscond if he got the money. He might have no occasion, yet he might take the opportunity of doing so. That being the case, and there being an allegation of fraud and the danger of the respondent's absconding, the Court would be justified in granting an interdict restraining the company from paying over the insurance money to respondent, pending an action to be forthwith brought by applicant. The costs would abide the result of the action.

[Applicant's Attorneys, Messrs. Fairbridge & Arderne; Respondent's Attorneys, Messrs. Van Zyl & Businncf.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 1893.
Justice BUCHANAN, and Mr. Feb. 10th,
Justice UPINGTON, K.C.M.G.]

In re REFORMED CHURCH OF PHILIP'S TOWN.

Mr. Tredgold moved for leave to sue by edictal citation in an action against John Goldsby for the recovery of the purchase amount and rates due on an erf in Philip's Town, already attached *ad fundandam jurisdictionem*.

The Court granted the order; citation to be returnable on last day of term; personal service, failing which one publication in the *Bloemfontein Express*.

ATKINSON V. ATKINSON.

Mr. Castens moved on behalf of Amy J. Atkinson for leave to sue her husband in *forma pauperis* for restitution of conjugal rights.

Referred to counsel.

IRVINE V. IRVINE.

Mr. Maskew moved on behalf of Elizabeth J. T. Irvine for leave to sue her husband in *forma pauperis* for a decree of separation by reason of his intemperance and misconduct, also for the custody of the children of the marriage.

Referred to counsel.

PETITION OF PORT ELIZABETH TOWN COUNCIL.

Mr. Juta moved for the amendment of the description of certain lots of ground ordered to be attached and sold under the Titles Registration and Derelict Lands Act, 1881.

The Court made the order.

VAN NIEKERK V. BLAKE AND { 1893.
SCHWARTZ. Feb. 10th.

Registered condition—Interpretation of—
Sale of meal—Restraint on.

A mill property having been sold and transferred on condition that the purchaser shall not, either directly or indirectly, sell meal to anyone resident in the P. Municipality,

Held, that a lessee from the purchaser was not prohibited by the condition from selling wheat to his customers within the P. Municipality, they being at liberty to have it

ground elsewhere, and the price of the wheat being the same whether it be ground at such mill or taken away without being ground there.

This was an action instituted by Maria Petronella van Niekerk, of the Paarl, against James J. Blake, Stephanus G. Schwartz and Francis J. Schwartz, for £50 damages, alleged to have been sustained under the following circumstances as disclosed in the pleadings.

The declaration alleged:

1. That the plaintiff is the widow of the late Sebastian Valentyn van Niekerk, and prior to her marriage with the said Van Niekerk was the widow of the late Pieter Jacobus de Villiers.

2. The defendant Blake is a miller, residing at Paarl; the other two defendants also reside at Paarl, and carry on business as millers.

3. The said Pieter Jacobus de Villiers referred to in paragraph 1 was the owner of a certain piece of freehold land, called "Nantes," with land adjoining called "Mill Ground," also a portion of "Nantes."

4. On or about the 12th October, 1877, the said P. J. de Villiers sold a portion of the said land called "the New or Kleine Molen" to the defendant Blake. On the said piece of land was, and still is, situate a mill. The said piece of land was sold subject to the following, amongst other conditions: "The purchasers of the New or Kleine Molen or the subsequent proprietors thereof shall not, directly or indirectly, sell meal to anyone who is residing within the boundaries of the Paarl Municipality; as likewise, shall not carry on a bakery business within the boundaries of the Paarl Municipality, and also shall not grind at a lower rate than 1s. per bag of three bushels."

5. The said portion of land was thereafter, to wit, on the 15th January, 1878, duly transferred to the defendant Blake, subject to the aforesaid conditions of sale, which were annexed to and incorporated in the said deed of transfer of the said land.

6. The said condition was imposed on the proprietor of the "New or Kleine Molen" in favour of the proprietor of the remaining portions of the said land called "Nantes," on which also a mill was at the time of the aforesaid sale to defendant Blake, and still is situate.

7. On or about the 15th July, 1890, the remaining portions of the said land called "Nantes" and "Mill Ground" were transferred to the plaintiff, who is still the registered owner thereof.

8. On or about 1st January, 1892, the defendant Blake leased the "New or Kleine Molen" to the defendants Schwartz, and the said defendants hired the said "New or Kleine Molen," subject to the condition referred to in paragraphs 4 and 5.

9. Between the 1st January, 1892, and the commencement of this action the defendants Schwartz, with the knowledge of the defendant Blake, sold and continue to sell to persons residing within the boundaries of the Paarl Municipality wheat, on condition that the wheat so sold and before delivery to the purchasers shall be ground at the defendants' said mill, for which they make the usual charge for grinding the wheat of persons who bring their own wheat to be ground at the mill. After the said wheat is ground into meal it is delivered to the said purchasers.

10. The plaintiff contends that the facts stated in paragraph 9 constitute a breach of the condition referred to in paragraph 5 in so far as it prohibits the proprietor of the "New or Kleine Molen" from selling, directly or indirectly, meal to anyone residing within the boundary of the Paarl Municipality.

11. By reason of the premises the plaintiff has sustained damages to the amount of £50.

Plaintiff claims:

(a) £50 damages as aforesaid against the defendants Schwartz.

(b) An order of this honourable Court restraining the defendants, each and all of them, from further infringing the conditions referred to in paragraph 5 of the declaration.

(c) General relief.

(d) Costs of suit.

The defendants in their plea admitted the allegations in paragraphs 1, 2, 3, 4, 5, and 7.

As to paragraph 6, they admitted that at the time of the aforesaid sale to the defendant Blake, a mill was and still is situate upon the remaining portion of the land called "Nantes," but they denied the other allegations in the said paragraph. As to paragraph 8, they admitted that on or about 1st January, 1892, the defendant Blake leased the "New or Kleine Molen" to the defendants Schwartz, and they also admitted that the terms of the said lease contained a stipulation in regard to the matters referred to in paragraphs 4 and 5 of the declaration, subject to the above they did not admit the said 8th paragraph.

They admitted that between the 1st January, 1892, and the commencement of this action the defendants Schwartz had sold wheat to certain persons residing within the boundaries of the Paarl Municipality, and they admitted that some of the wheat so sold had thereafter, at the request of the owners who had purchased it, been ground by the said defendants as millers, at the usual charge, and that the meal which had resulted from the grinding had been duly delivered to the owners. The defendants said that they had a right to do so, and save as above, they denied all the allegations in the 9th paragraph of the declaration.

They did not admit the correctness of the contention set forth in the tenth paragraph of the declaration, and they denied the allegations in the eleventh paragraph. Wherefore they prayed that the plaintiff's claim might be dismissed with costs.

The replication was general and issue was joined on these pleadings.

Mr. Searle and Mr. Webber appeared for the plaintiff, and Mr. Schreiner, Q.C., and Mr. Molteno for the defendants.

Jacobus P. de Villiers, a son of the late P. J. de Villiers, deposed that his father died in 1889, and left no will. Witness and his mother were the only persons interested in the estate. His mother paid £2,650, and took over the property. There was an old mill on the property, and milling had been carried on there for more than fifty years. Knew Mr. Blake and the Schwartzes, and was intimately acquainted with the subject of the action. Witness and his mother did a considerable milling business in the district. Within the last year some customers had left; people came to them and asked the price of meal, and when told, they said: "We can get it cheaper at the upper mill." They sold meal and wheat at the mill. Most of the customers resided in the Municipality.

Cross-examined: Their mill was on the main road. Did not remember any case where people had bought wheat at their mill and paid for grinding. It might have been done in one instance. Witness was not the miller. He was not always at the mill.

Rudolph C. Malherbe deposed that he kept a shop at the Paarl, where he sold meal. He knew defendants Schwartz since they hired the mill a year ago. They came to witness and asked him if he wanted to buy wheat, and he said, "Yes," and they said, "Then we will have to grind it for you." He never saw any corn—just the flour. When he sent for more he had to give them notice, in order to allow them time to grind. He bought about ten bags at a time, and when he wanted the meal he sent for it. He produced accounts for the wheat purchased and for grinding the wheat; also for bran, rendered by the Schwartzes. He had also a book of accounts. [Book handed in.]

The Chief Justice: I observe a declaration in Dutch at the beginning of the book to the effect that the witness had never bought meal—only wheat and corn. This was signed by witness.

Witness said Mr. Blake had asked him to sign it.

Cross-examined: He had taken the corn away from the mill on occasions, so that he had seen the corn. In his dealings with the Schwartzes he had always found they gave him good corn, which, when ground, gave good meal.

Re-examined: He had never sent corn to the mill to be ground.

By the Court: Witness bought the wheat at the

market price, and could, had he cared, taken the wheat elsewhere to be ground. He paid £1 8s. per muid.

Jacob S. Krige, shopkeeper, Paarl, deposed that during 1892 he had dealt with the Schwartzes. He went to them for meal. They said: "You can't have meal." Witness bought corn, and paid a shilling per bag for the grinding. What he wanted was meal, and he had meal delivered to him. Many times he paid for the corn by cheque, and the grinding by cash.

Cross-examined: Paid a fair market price for the wheat. Had never had wheat delivered.

David Jacob N. Vester, retail dealer, Paarl, deposed that he had bought wheat from the Schwartzes. He bought about ten muids of wheat at a time, and had the meal brought to the shop from time to time—one bag at a time usually. Paid 18s. a bag for the wheat, and 1s for the grinding. He paid when he had the money.

By the Court: He could take the wheat anywhere else if it was his. There was no condition that the wheat bought must be ground at the mill.

This closed the case for the plaintiff.

Mr. Schreiner said in view of the evidence which had been called for the plaintiff, he would not take up the time of the Court further than to ask for absolution.

Mr. Searle was then heard for the plaintiff, and contended that the wheat sold was always ground, and thus there was an indirect sale of meal in contravention of the deed. Krige went and asked specially for meal, and was told he could buy corn and have it ground. The condition would be wholly nugatory if this were allowed, and the sale of corn a clear evasion of the deed. See "*Harms v. Parsons*" (82 Beav., 828). It was quite open to defendants to grind corn when brought to them. See also "*Buckle v. Fredericks*" (44 L.R., Ch. Div., 244), "*Bramwell v. Lacy*" (10 L.R., Ch. Div., 691), and "*Fellden v. Slater*" (7 L.R., Eq., 528). The gist of the whole transaction must be looked to.

Mr. Schreiner, Q.C., was not called upon.

The Chief Justice said: The question is whether the defendants have infringed one of the registered conditions upon which the upper mill property was sold by the plaintiff's predecessor in title to the defendant Blake. The condition is that "the purchaser of the new mill, or any subsequent proprietor thereof, shall not, either directly or indirectly, sell meal to anyone resident within the Paarl Municipality." The defendant Blake has let the property to the defendant Schwartz, and, for the purpose of this case, we may assume that the prohibition applies to the lessee as well as to the proprietor.

Mr. Searle has candidly admitted that there has been no direct sale of meal by Schwartz, but he contends that, according to the evidence, the sales,

although nominally of wheat, have been, indirectly, sales of meal. The essentials of a sale are a price to be paid and a thing to be delivered. It is clear from the evidence of Schultz's customers who were called by the plaintiff that a price was to be paid by them for the wheat, as distinct from the charge for grinding the same, and that the thing to be delivered for such price was wheat.

No doubt there was an arrangement that so much of the wheat as was not required in the form of wheat should be ground at the mill, but the price was the same whether the wheat was ground at the mill or taken away without being ground. Every one of the witnesses denied that there was any condition that the wheat must be ground at the mill, and said that they could claim delivery of the wheat without its being first ground.

The effect of the word "indirectly" was to prevent transactions by which sales of meal might be made to persons resident outside the Municipality with an understanding that the meal was to be delivered to persons resident within the Municipality, but the meaning of the word cannot be strained so as to include, in sales of meal, transactions by which meal has not been sold at all. If this wide meaning was intended, nothing would have been easier than for the seller of the mill property to have introduced appropriate language for the purpose. This Court at all events will not impose a restraint on trade which was not clearly within the contemplation of the parties to the original sale of the mill property. The plaintiff having failed to prove an infringement of the condition, there must be absolution from the instance with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret; Defendants' Attorney, C. C. de Villiers.]

RAS V. WIESE.

{ 1898.
Feb. 10th.

Act 20 of 1856, section 8—Magistrate's jurisdiction—Title to land—Trespass.

A Resident Magistrate has no jurisdiction in an action for trespass wherein the bona-fide question in dispute is whether the plaintiff, as the registered owner, had legally obtained transfer of the land alleged to have been trespassed upon as against a third party who had given the defendant leave and licence to commit the alleged trespass, another action being at the time pending in the Supreme Court in which such third party

sued the plaintiff to have the transfer set aside.

This was an appeal from a decision of the Resident Magistrate of Victoria West in an action in which the appellant (plaintiff in the Court below) sued the respondent (defendant in the Court below) for £20 damages, alleged to have been sustained owing to the action of the defendant in having wilfully trespassed with his sheep from the 24th to the 29th December, 1892, upon the farm De Burg, the property of the plaintiff, which sum of £20 the summons alleged the defendant refused to pay, on the grounds that the property trespassed upon belonged to the defendant. The defendant's agent excepted to the summons, on the ground that there was a case pending in the Supreme Court wherein the title to the land upon which the trespass was supposed to have taken place was in dispute, and in consequence the Court had no jurisdiction.

The Magistrate upheld the exception and dismissed the case with costs, the following being his reasons: It being clearly established by the evidence adduced and the admission of the parties to the suit that there was a *bona-fide* dispute between the parties in respect of the title to the land called De Burg trespassed upon by the defendant and that rights in future will be involved, the Court held its jurisdiction to be ousted by sub-section 8 of section 8, Act 20 of 1856.

The defendant gave the following evidence at the trial:

Andries Tobias Wiese, duly sworn, states: I live at Vlakkraal, in this district. I am the defendant in the suit. The piece of ground upon which the alleged trespass took place is called De Burg. It adjoins my farm. I bought it in 1889 from L. P. Steenkamp and I. B. van der Westhuisen, grandchildren of Mrs. J. de Villiers, widow of the late L. P. Steenkamp. I have not paid transfer duty, as the condition is that I am not to take possession until the death of Mrs. De Villiers, widow of the late Steenkamp, as she has a life interest in the said piece of ground under the will of her late husband. There is a "koop-brief," which was drawn up by the late Mr. Blundell. I paid £500 on account of the purchase amount, which was £1,500. The sale was with the consent of Mrs. De Villiers, the executrix of the late Steenkamp. The balance of the purchase money I was to pay after the death of Mrs. De Villiers. I did not pass a bond. I am aware that plaintiff has title of the said piece of ground in question, but I have not seen the transfer. I have not been subpoenaed as a witness in the case pending in the Supreme Court. I told the children that the ground had been sold to plaintiff by the grandmother, Mrs. De Villiers. I went to

Cape Town with Steenkamp and Van der West. When they handed the case over, and when they signed a power of attorney to go on with the case. I went to Cape Town for this particular purpose. The action is for a declaration of rights, so as to enable them to pass transfer to me in accordance with the "koop-brief." I went to Cape Town in October last. Plaintiff told me he had bought the life interest in this piece of ground for £600. He told me this in September last. I have the "koop-brief" in the village. I had a letter from my son, who is in Cape Town, that the case is coming on in Cape Town on 10th February, 1892.

Plaintiff's attorney admits that case is pending in Supreme Court.

Cross-examined: I must get transfer of the piece of ground in question on the death of Mrs. De Villiers. I have not taken possession of the piece of ground in question. I did not get written consent to the sale from the executrix. I am not a party to the suit pending in the Supreme Court. The case is to enable the children to give me transfer. I can't say if the transfer can be given during the lifetime of the mother of these children. The case in the Supreme Court is to set aside the transfer to the plaintiff. In 1890 there was a similar case in this Court. Plaintiff was the lessee of the said piece of ground. He leased it from Mrs. De Villiers. An action was brought against me for damages for trespass, which was given against me. I don't deny the trespass alleged in the case. I made use of the said piece of ground after I heard that plaintiff had transfer of it. The "koop-brief" in question is signed by seller and myself. The name of the executrix does not appear in the "koop-brief." I put the same "koop-brief" in in the case in 1890. The executrix is still alive.

Re-examined: At the time of the first case the plaintiff was only lessee. I bought the ground in 1889. In 1890 I paid part of the purchase amount. Plaintiff has got transfer of this piece of ground. Mrs. Steenkamp, now married to Mr. Snyman, gave her consent verbally in the presence of four witnesses to the purchase by me of the said piece of ground, and she is aware that the first instalment of £500 has been paid.

The defendant's agent here stated that he did not deny the transfer in favour of the plaintiff, but that the said transfer was in dispute.

The Magistrate dismissed the case as above stated.

The plaintiff now appealed.

Mr. Schreiner, Q.C., was heard in support of the appeal, and contended that the Magistrate had erred in dismissing the case for want of jurisdiction, as the title to land was not in dispute. It was admitted that the plaintiff was the registered owner, and that the defendant had trespassed.

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The latter could not rely upon the fact that third persons had instituted proceedings, to which he was no party, to have the title of the plaintiff set aside. It was not competent to a defendant in an action for trespass to justify against the registered owner by setting up merely the alleged title of some third person who was not in possession. Such third person would be a trespasser, quite apart from the question of title. The *bona-fide* possessor can maintain an action for trespass against the owner for disturbing him in his quiet possession. The question in the present case was purely one of possession, and could have been decided by the Magistrate. Counsel cited "*Kennard v. Hirsch*" (6 Juta, 828).

Mr. Juta, for the respondent, referred to "*Reed v. The Graham's Town Municipality*" (5 Juta, 127).

Mr. Schreiner, Q.C., replied.

The Chief Justice said: The Magistrate had no jurisdiction in this action if it was one wherein the title to any lands or tenements was in dispute. The action was for trespass, and the defence— independently of the question of jurisdiction— was that the alleged trespass had been committed by the defendant by the leave and licence of Steenkamp. If Steenkamp could give such leave and licence the defence would be a good one, and therefore the action may be treated as one against Steenkamp. Clearly as between him and the plaintiff there was a question as to the plaintiff's right to the title which he had acquired. Transfer had been passed to the plaintiff but the validity of this transfer was in dispute. An action is now pending in the Supreme Court in which Steenkamp is suing the plaintiff to have the transfer set aside on the ground of its invalidity. The Magistrate was satisfied that the dispute is a *bona-fide* one, and this view is supported by the evidence. The plaintiff's right to acquire the title to the land in question being in dispute, I am of opinion that the Magistrate was right in holding that the action was one wherein the title to land is in question and in allowing the exemption to his jurisdiction. The appeal must be dismissed with costs.

Their lordships concurred.

[Appellant's Attorney, W. E. Moore; Respondent's Attorneys, Messrs. Van Zyl & Buissinne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), and } 1898.
Mr. Justice BUCHANAN.] Feb. 18th.

MURPHY V. CREAGH.

Mr. Schreiner, for defendant, asked that this case might be allowed to stand over till to-morrow.

Mr. Graham, for plaintiff, consented, and the case was ordered to stand over until to-morrow (Tuesday).

STEENKAMP V. DE VILLIERS AND } 1898.
ANOTHER. } Feb. 18th.

Mr. Juta moved upon notice given by applicants, who were plaintiffs in an action against defendants, to allow Mrs. Steenkamp to intervene as a co-plaintiff.

The plaintiffs tendered the costs incurred by the defendants in connection with an exception taken to the declaration, but which exception it would not be necessary to argue if Mrs. Steenkamp were allowed to intervene.

Mr. Schreiner, Q.C., for the defendants, contended that the tender amounted to nothing, as no separate costs had been incurred by taking the exception. The wrong persons had instituted the action, and they should pay all costs up to date. The Chief Justice said the offer made by plaintiff's attorney appeared to be fair. If any costs were incurred in connection with the exception plaintiff said, "I'll pay for them." That seemed to his lordship perfectly fair, and ought to have been accepted by the defendants. The Court was not inclined to encourage applications of this kind unnecessarily. It would have been necessary for the plaintiff to have come into court to apply for leave to intervene, and therefore the Court in making the order as to costs would authorise Mrs. Steenkamp to intervene, defendants to pay the costs of opposition. The intervention would be allowed on the terms contained in Mr. Van Zyl's letter.

SAMUEL V. BARNATO BROS.

Mr. Schreiner moved in this matter, which was an application for joint commissions to be issued in London and Johannesburg, to take evidence on behalf of plaintiff and defendants.

Mr. Giddy, for the defendants, consented, and the Court appointed Mr. Maokarness commissioner in London, and Mr. Curlew in Johannesburg.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, } 1898.
K.C.M.G. (Chief Justice), and } Feb. 15th
Mr. Justice BUCHANAN.]

REGINA V. JAN LINKS.

Review of a sentence imposing a fine of 5s., and return of 7s. advanced, passed by the Special Justice of the Peace for Namaqualand.

Mr. Justice Buchanan said the accused had been convicted of contravening the Masters and Servants' Act 18 of 1878, section 1, but apparently there was no agreement entered into. Links had received 7s. to do certain work, but there was no work to be done at the time. He was to be told when to come, but the man never turned up. In cross-examination it was admitted that there was no contract. There being no specified contract, there could be no contravention of the section, and the conviction must be quashed. That was not material to the prisoner now, as he had already had his eight days.

MURPHY V. CREAGH. { 1898.
Feb. 14th.

Slander—Action—Damages.

This was an action for slander instituted by Dr Wm Murphy, of Kimberley, against Mrs. Agnes Marie Creagh, proprietress of the Central Hotel, Kimberley. Damages were laid at £500. The plaintiff in his declaration alleged that on or about 8th day of February, 1892, and at Kimberley, the defendant, in the presence and hearing of one Thomas Welch and divers other persons, falsely and maliciously spoke and published of and concerning the plaintiff the following false, scandalous, malicious, and defamatory words. (Then followed the defamatory words complained of.)

The plaintiff further said that on or about the 15th February, 1892, in the presence and hearing of one Thomas Archibald Webber and divers other persons, the defendant falsely and maliciously spoke and published of and concerning the plaintiff the following false, scandalous, malicious, and defamatory words. (Then followed the defamatory words complained of.)

The plaintiff alleged that by reason of the premises he had been greatly injured in his good name and fame, and had sustained damage to the amount of £500. The plaintiff prayed for judgment for the sum of £500, with costs of suit.

The defendant denied in her plea that she had made use of the words alleged in the declaration, and prayed that plaintiff's claim might be dismissed with costs.

Mr. Graham and Mr. Tredgold appeared for the plaintiff; Mr. Schreiner, Q.C., and Mr. Webber for the defendant.

Wm. Murphy, doctor of medicine, plaintiff, said he had resided at Kimberley since the opening of the Kimberley mine. He had a practice of between £4,000 and £5,000 a year at one time. He had been chairman of the De Beers Mining Board, and had been chairman of other public boards. He knew the defendant Mrs. Creagh. In November, 1891, he hired a room from her in The Villa, which was about 200 yards from the Central Hotel. Prior to that for two or three years he had taken his meals at the hotel. In February, 1892, he had an altercation with a servant, and Mrs. Creagh's manager (Hindes) came and told witness he would have to leave. Witness at first refused, but afterwards got a week's notice. He was not to get his meals any longer at the hotel. At this time witness was in very poor health, and was being medically attended. Mrs. Creagh knew he was ill, because she used to send his meals up to The Villa. One door of his room opened on to a narrow verandah, which was enclosed with open trellis work. On the morning of the 15th witness had seen his attorney, and Mrs. Creagh called upon him about eleven o'clock. Witness was ill in bed. She came into his room. He could compare her entrance to nothing else than a whirlwind. She flourished her parasol and "was d——d if she did not soon have me out of that." If I did not get out she was going to bring up half a dozen boys to fling me out. She made use of very filthy language. She was a woman of violent temper. I sat up in bed and expostulated with her. The door was open and people passing on the street could hear what was being said. She did not desist, but called me a "d——d old liar," a thief, and "the greatest blackguard in Kimberley." I said was she not ashamed of herself. She said, "You and I for it now." Afterwards she went away. I looked the door. In the afternoon young Webber came up. I asked him what he wanted. He said, "Mrs. Creagh has sent me up to take the doors and windows out and take the roof off." I said, "If you interfere here I shall have to send for a policeman and give you in charge." He went away and there were no more whirlwinds. Later on Mrs. Creagh and her manager and Webber came up. Mrs. Creagh knocked and called me to come out. I said, "I am abiding by the advice of my attorney." She repeated the whole abuse over again. She said, "I'll stay here all night, and a d——d fine time you'll have of it." She said I was only shamming, and if I died that night there was no one in Kimberley who would put the pennies on my eyes. She called me a black-hearted old scoundrel, that I was a liar, and had not a friend

in Kimberley. She said I was a thorough old villain, and she would have me out that evening, if she brought half a dozen boys. As matter of fact, my goods and papers were afterwards turned out. I was not allowed to have my meals at the hotel. I went to the Queen's. I have suffered considerable damage in consequence of what occurred.

Cross-examined by Mr. Schreiner, Q.C.: The summons was issued on 8rd June, 1892. Witness brought his action for ejectment in the High Court because it was a matter of urgency.—Q. Why did you not bring the action for slander in the High Court?—A. For reasons of my own. One reason was that I had a very lively recollection of the justice and impartiality of the Supreme Court in a previous case.—Q. As a matter of fact, you got Magistrate's Court costs and only £10 damages after you had led the evidence as to slander?—A. The question of slander crept up during the hearing of the case, in which an appeal has been noted. Mrs. Creagh spoke to me in an abusive manner on the 15th. I never accused the servant of putting poison in the coffee.—Q. After you received notice you refused to go, and Mrs. Creagh had your goods and chattels turned out?—A. Yes, everything—papers, scrip, and everything turned out. On the 8th February she came and told me to clear out.—Q. You heard no strong language on the 8th?—A. I heard strong language on the 15th. She was like a lunatic on that date.—Q. What damage have you sustained?—A. Considerable.—Q. Pocket suffered?—A. No.—Q. Practice suffered?—A. I am independent of practice.—Q. Lost any appointment?—A. I never sought any appointment.—Q. Have you lost anything whatever?—A. I am still a director of different companies, and what she said is calculated to damage me in that respect.—Q. Why do you proceed with this action in the Supreme Court when the whole matter was already before the public in the High Court of Kimberley?—A. For very grave and serious reasons of my own.—Q. Did Mrs. Creagh not call you a vindictive old man?—No. Q. She told you that if you died that night there would be no one to put the pennies on your eyes. Do you call that defamatory?—A. I take everything together, and what she said was defamatory.

By the Court: Was quite certain the words "lying old devil," "rascal," "villain," and "blackguard" were used by defendant. Went to the Transvaal after he got better.

Thomas A. V. Webber, a carpenter, deposed that in February he was asked by Mrs. Creagh to go up to the cottage in connection with the hotel, and take down the doors and windows of Dr. Murphy's room. Witness went up, and Dr. Murphy threatened to bring the police. Afterwards Mrs. Creagh and Mr. Hindes came up

Mrs. Creagh called the doctor "a black-hearted old scoundrel," "lying old devil."

Cross-examined: Witness did not think Mrs. Creagh was in earnest when she told him to take the doors and windows down. She was jocular.

By the Court: He thought she was angry.—Q. Then where did the joke come in?—A. Because I did not take out the windows or doors.—Q. She did not afterwards insist upon your doing it?—A. No.—Q. Did she laugh?—A. I never heard her laugh.

Thomas Welch deposed that he boarded at the Central Hotel, and knew Dr. Murphy. On the 8th February witness was standing on the stoep. Mrs. Creagh came out, and said, "That old scoundrel, Dr. Murphy, has been trying his game on again. He has been making himself disagreeable to the ladies, and accusing the coloured servants. I shall not allow the old villain to carry on the way he has done. D—d old scoundrel. If he died to-morrow there would not be a soul to follow his funeral. There's not his equal for badness in South Africa. He's an old liar."

By the Court: He believed Mrs. Creagh was married.

Cross-examined: Q. She allowed you to run up a bill for £18 when you were destitute?—A. I never was destitute. I am a friend of Dr. Murphy's.

This closed the plaintiff's case.

For the defence, William Hindes, recently manager of the Central Hotel, Kimberley, remembered serving Dr. Murphy with a notice to quit. Remembered also going up to the room along with Mrs. Creagh on the 15th. Mrs. Creagh never used the words which had been attributed to her. She was not even in a rage. She was rather jocular. She quietly asked the doctor to give up possession of the room, and he did not hear her blackguard him. There was no allegation of improper conduct against Dr. Murphy. Welch had run up a bill for £18 and had been sued for it, but the money had not been paid yet.

By the Court: You have never seen her out of temper about this business?—A. I have seen her reasonably annoyed, but not very cross.

Agnes Marie Creagh, defendant, deposed: On the 8th February I did not go to see Dr. Murphy. I knew that Mr. Hindes, acting on my instructions, had given him notice. What Welch has said—that I called Dr. Murphy a scoundrel, liar, &c., is untrue, because I have never spoken to Welch on the subject. I did not speak to Dr. Murphy until the 15th, when his week's notice was up. I sent for Webber to take the doors and windows out. The doctor had been very nasty and I wished him to leave. I never used any of the language which the doctor has attributed to me. I was annoyed at the doctor because he was giving me so much trouble, but I was not in a

violent temper. I asked him to quietly leave the room, because he had been trying to get rid of servant who had been with me for five years. He charged the servant with putting poison in his coffee. He took the coffee to a chemist and had it analysed. I was sued for ejectment in the High Court.

Cross-examined: Had been living at Kimberley for ten or twelve years. Was first in Mr. Woodhead's employ, and then took the Central Hotel. Had two interviews with Dr. Murphy on the 15th. It was not a stormy interview. Dr. Murphy stayed in bed all day, and remained out all night. If Dr. Murphy had not left witness should have lost all her other guests. She told him that he had not a friend in Kimberley, and if he died that night he would have no one to put the pennies on his eyes. She said no more. Had she been a man she would not have suffered all the persecution that Dr. Murphy had brought upon her. Was not by any means in a rage, and was quite positive that she used no unseemly language. She was not a bad-tempered woman. She was passionate and given to speaking home-truths. Perhaps she had spoken some home-truths to Dr. Murphy, but she did not call him a liar. Had he had the instincts of a gentleman he would have left the cottage.

By the Court: When she said the doctor was annoying the ladies, she meant he was cantankerous and insulting.

This closed the case for defendant.

Mr. Graham was heard on the question of damages only.

Mr. Schreiner, for the defendant, contended that the plaintiff had incurred no damage, and that if judgment were given in his favour it should only carry Magistrate's Court costs.

He cited "Bosenberg v. Langermann" (decided in October, 1889, not reported).

The Chief Justice said the first question was whether the defamatory language alleged in the declaration had been used by the defendant concerning the plaintiff. Now, as to the first count, the Court was inclined to give defendant the benefit of any doubt which there might be upon the subject, but they were quite satisfied as to the second count, that words of similar purport were used to those which were alleged in the declaration. The epithets applied by defendant to plaintiff were that he was "a black-hearted scoundrel" and "a lying old devil," and to clench it all, it was added that upon his death there would be found no one to close his eyes. This language was used about an old man against whom no charge was now raised. There was no attempt to substantiate the statement that the plaintiff was of that bad character which had been imputed to him. It would have been competent to have proved that charge. It would have been to the public interest

to have known that a person of bad character was going about, and there would have been no difficulty in giving evidence to prove the truth of the statements. But that was not the defence. The defence was that no language of the kind was used at all. As regarded the second count, the language imputed to the defendant was used by her. That being so, the next question was—was it defamatory? Mr. Schreiner had made no serious attempt to show that it was not defamatory. He had attempted to show that only thin-skinned people would take notice of such language. Thick-skinned people like himself would take no notice of such language. If every one were so thick-skinned they would never hear of any actions for slander. There were few cases which did a plaintiff any good by bringing an action for slander. But the law gave him the opportunity, and if he succeeded in it he was entitled to damages. If this language specified were not libellous or defamatory, they might as well abolish the law of defamation altogether. To be called "a black-hearted scoundrel" seemed to him (the Chief Justice) to be as strong language as could be used, and to add to that "that he was a lying old devil," and to clench it all by saying that he was so bad that he did not deserve anyone to close his eyes in death; that was language one could hardly imagine a respectable woman using. It was language one might expect to hear in Billingsgate. On the face of it there seemed to be an improbability that it was used but for the clear evidence to the contrary. There could be no doubt that it was defamatory. Then came the question of damages. In regard to damages it was impossible to lay down any general rule as to the measure of damages in cases of slander; for each case must be judged upon its own merits. All the circumstances in the case must be taken into consideration. The case of "Bosenberg v. Langermann," which had been cited, was different from the present. There the defendant admitted that he had used certain words which were defamatory, but was willing to withdraw them altogether, and there were circumstances in that case which, although they did not justify the defendant in using the language complained of, yet went far to mitigate the damages. In the present case it was urged that the plaintiff ought to have proceeded either in the Magistrate's Court at Kimberley or in the High Court, but the plaintiff could choose his own forum. There might be reasons why this Court would be better. At all events here—not as in the case of the Magistrate's Court—the parties were not known. His lordship knew nothing of plaintiff and nothing of defendant and judged the case entirely on its merits. He assumed that the plaintiff was an honest man, and in the absence of proof to the contrary he was entitled to assume that, and he (plaintiff) was

entitled to come into this Court and claim his damages and get costs. But heavy damages were not pressed for; therefore under all the circumstances the Court would award £25, but before deciding the question of costs, the Court would like to know if the appeal was to be proceeded with.

Mr. Graham said there had been no instructions to proceed with the appeal. The real point in dispute was the question of costs.

Mr. Graham promised to consult with his client during the luncheon hour.

At a later stage Mr. Graham intimated that Dr. Murphy was willing to accept the suggestion of the Court and not press the appeal.

The Chief Justice said he thought that that was a very wise course to adopt. The judgment would be for £25 damages with costs.

Their lordships concurred.

[Plaintiff's Attorney, Gus Trollip; Defendant's Attorneys, Messrs. Van Zyl & Buisainné.]

DE BEER V. ROSE. { 1898.
Feb. 14th.

Superannuated judgment—Revivor—Practice—Summons—Notice of motion—Magistrate's Court.

It is no valid objection to a motion in a Magistrate's Court for the revivor of a superannuated judgment of such Court that the defendant has been brought into court by means of a notice of motion, duly served, instead of a formal summons.

This was an appeal from a judgment of the Resident Magistrate for Prince Albert in a case heard on 12th January last upon a notice of motion for revival of a judgment for £8 17s. 8d. with interest and costs, granted in favour of plaintiff (present respondent) on 16th April, 1891.

The defendant (present appellant) excepted to the summons on the grounds that no summons was issued from the Court for the revival of judgment, but only a notice of motion served upon the defendant by the plaintiff's attorney; also, that there was no ground of action to show any cause of action. The exceptions were overruled. The only evidence given was that of the Magistrate's clerk, who produced the original proceedings in the suit of Rose v. De Beer, heard on 16th April, 1891, in which judgment was given against defendant for £8 17s. 8d. with interest and costs.

The Magistrate gave judgment reviving the previous judgment for £8 17s. 8d. with interest and costs as prayed, to be paid by instalments of £1 per month, the first payment to be made on 1st February, 1898.

The following were the Magistrate's reasons: I considered that a notice by the plaintiff's attorney, served on the defendant through the Resident Magistrate's Court through the messenger, was quite sufficient; and second, the defendant was not in any way prejudiced by the amount of the judgment previously passed against him not being inserted in the said notice.

From this judgment the defendant now appealed.

Mr. Molteno was heard in support of the appeal, and contended that the notice of motion was not sufficient. A summons should have been issued. He cited Act 20 of 1866, schedule B, rules 5, 10, and 12; "Bank of Africa v. Kimberley Mining Board" (2 App. Cas., 6); "Van der Linden"; "Voet" (42, 1, 47); "Queen v. Wetton" (2 App. Cas., 71); "Queen v. Sampson" (8 Juta, 229); "Queen v. Meiring" (8 Juta, 276).

The respondent did not appear.

The Chief Justice said: The plaintiff has duly issued his summons and obtained a judgment in the Magistrate's Court, but has failed to enforce it within twelve months after its date. He accordingly gave written notice to the defendant that he would, on a certain day, apply to the Magistrate for an order reviving the judgment. The defendant appeared and raised the objection that a notice of motion was not sufficient and that he ought to have been brought into court on a formal summons. The Magistrate properly overruled the objection. Neither here nor in the Court below was any explanation given of the benefit which it would have been to the defendant if he had been summoned instead of being brought into court by notice of motion.

Of course, if the rules of Court require a summons they must be conformed to unless the defendant has waived his right to object, but those which have been cited do not apply to a case like the present, where a summons has been duly issued, and the sole object of the application is to give effect to a judgment obtained upon such summons.

Some of the old Dutch authorities have been referred to, but their authority has no weight in regard to practice in the Magistrates' Courts, which is regulated by the Magistrate's Court Act of 1866 and schedules thereto.

These rules are silent as to the mode in which the defendant should be called upon to show cause why a judgment against him shall not be revived. But the case of *Bank of Africa v. Kimberley Mining Board* (2 App. Cas., 6), cited on behalf of the appellant, clearly shows that the object of the practice requiring a revivor of judgments was merely to prevent the defendant being taken by surprise.

This object would be gained by a notice of motion as well as by a summons. If the formality

of a summons is retained in Supreme Court practice there is no reason for introducing it into the Magistrates' Courts, where more even than in this Court simplicity and cheapness should be encouraged as much as possible.

The appeal must be dismissed.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Fairbridge & Arderne.]

THOMPSON V. SCHIETEKAT. { 1898.
Feb. 14th.

Pounds Act, 1892—Sections 36 and 75—
Trespass—Damages—Redress at common law.

A person whose land has been trespassed upon by the cattle of another is entitled to redress at common law, where he has never impounded such cattle at all or where, having impounded such cattle, he has neither claimed damages under the 32nd or 33rd section of the Pounds Act, 1892, nor claimed assessment of damages under the 32nd section.

This was an appeal from a decision of the Resident Magistrate of Cape Town in an action in which the appellant (plaintiff in the Court below) sued the respondent (defendant) for £1 damages alleged to have been sustained by the plaintiff by reason of forty sheep and one goat belonging to the defendant having trespassed on his cultivated land on the 18th December last.

The defendant pleaded:

1. That the goat did not belong to her.
2. Tender of 8s. 4d. in terms of Schedule C, Act 15 of 1892, being before proceedings were commenced, viz, 14th December, 1892.
3. That she received no demand of any sort before receipt of summons.

The plaintiff admitted that he had refused the tender of 8s. 4d., and that he demanded £1.

The plaintiff gave the following evidence at the trial:

On the 18th December forty sheep and one goat came into my property, into my vegetable garden and did great damage. £1 would not cover the damage. These sheep went on to Rentakie's farm. My daughter watched to see who took them away. I got the note just read tendering 8s. 4d. I sent up word on the 18th, on the day of the trespass that I demanded £1, and sent a message to her (defendant) to come and see the damage. I assessed the damages myself. The sheep ate my mealies and trampled on my vegetables. They did not merely walk through. I saw them leavin the place.

I did not send a memorandum to the defendant. I did not have the damage assessed under the Pounds Act. I am in the habit of charging for trespass.

The sheep were off my property before I could get at them. The goat is constantly at the defendant's place. I have seen the goat with the sheep. These sheep have been in my place several times. The last time was about a month ago.

The Magistrate gave judgment for the plaintiff for 8s. 4d. damages, the plaintiff to pay costs, the following being his reasons: In this case it seemed to me that the plaintiff should have followed the course provided by section 86 of the Act 15 of 1892, the amount which he was entitled to under that Act having been tendered to him, and as he considered that it was insufficient, he was bound in my opinion to proceed under section 86. Instead of doing so he assessed the damages himself, which I think he had no power to do.

The plaintiff's agent contended that his client was not obliged to proceed under the Act, but could claim damages for trespass independent of the Act altogether. In this I do not agree with him.

On the question of fact there is of course only the evidence of the plaintiff and his daughter. There was no evidence on the other side, because the defendant holds that the proceedings should have been under section 86, which provides for arbitration.

From this judgment the plaintiff now appealed.

Mr. Graham was heard in support of the appeal, and relied on section 75.

Mr. Sheil, for the respondent, contended that the appellant could not rely on section 75, inasmuch as he had already demanded £1, presumably under the 82nd section. He referred to section 75, sub-section 1.

The Chief Justice said: Even if the 75th section had not been introduced into Act No. 15 of 1892 I would have been unable to support the Magistrate's view that the plaintiff is deprived by the 36th section of his right to relief at common law.

But the 75th section removes every possible argument in favour of that view. The provisos to the section do not touch the present case, for the plaintiff has never claimed damages or assessment of damages under the Act, nor has he impounded the cattle at all. He has proved damages to the extent of the amount claimed and the defendant has given no evidence to disprove his statements.

The appeal will therefore be allowed, and judgment entered for the plaintiff for £1 as damages, with costs in this Court and in the Court below.

Their lordships concurred.

[Appellant's Attorney, J. Hamilton Walker;
Respondent's Attorney, John Ayliff.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), and { 1898.
Mr. Justice BUCHANAN.] { Feb. 15th.

REGINA V. SEPTEMBER PIET, *alias* KOBESI.

On the motion of Mr. Giddy, the venue in this case was changed from the Supreme Court to the next Circuit Court to be held at Uitenhage.

MYBURGH V. MARAIS { 1898.
{ Feb. 15th.

Agent—Purchase of land—Bond—Payment to agent with principal's knowledge—
Fraud—Liability.

This was an action instituted by Albert Lambertus Myburgh against Daniel Francois Marais to compel transfer of a certain piece of ground situate in the division of Cradock, or in the alternative, the sum of £500.

The declaration alleged that on or about the 8th May, 1889, the defendant sold to the plaintiff and the plaintiff bought from the defendant a certain lot of ground, being lot 426, situate to the east of Rietfontein, in the division of Cradock, upon the following terms and conditions: The price of the lot was £850, of which £98 10s. was paid on the 20th October, 1889; £98 10s. was to be paid on 20th April, 1890, and for the balance the plaintiff was to take over a mortgage bond of £168, which was to be passed by the defendant to the Colonial Government. The said defendant, in or about the month of December, 1888, bought the said lot 426 from the Colonial Government, and by the conditions of sale the defendant was bound to pass a mortgage bond to the Government for £168 within thirteen calendar months from the date of sale.

The plaintiff duly paid the two instalments of £98 10s. each, and thereafter on 24th November, 1890, paid to the defendant, through his duly-authorized agent, W. Taylor, balance of the purchase price, the sum of £168; the defendant not having at that time passed the said bond of £168 to the Government, and the said Taylor received the said balance for and on behalf of the defendant. The plaintiff claimed: (a) Transfer of the said lot 426; (b) or in the alternative the sum of £500; (c) further relief with costs of suit.

The defendant in his plea denied the agency of Taylor as alleged in the declaration. The replication was general, and upon these pleadings issue was joined.

Mr. Juta and Mr. Buchanan appeared for the plaintiff, and Mr. Schreiner, Q.C., and Mr. Molteno for the defendant.

Albert L. Myburgh, plaintiff, deposed that he lived on the farm of Rietfontein, in the division of Cradock, and defendant lived in Maraisburg. In May, 1889, plaintiff bought a piece of ground from Mr. Marais adjoining the farm Rietfontein. He bought it out of hand. On the day he signed the papers he visited Maraisburg, and was taken to Mr. Taylor's office. The papers were signed there. The money was to be paid in instalments. The first instalment was paid 20th October, 1889. He went into Maraisburg and put up at Mr. Marais' house. Mr. Marais took him to Mr. Taylor's office. A declaration of seller and purchaser was drawn up, and a receipt was given for the money. Marais took the money home with him. On 20th April, 1890, he visited Maraisburg again, and paid the second instalment at Mr. Taylor's office, Mr. Marais being present. Towards the end of 1890 he went into Maraisburg in order to pay over the final instalment. He told Marais he wanted transfer, and Marais said he must go and see Mr. Taylor. Plaintiff went to Taylor's office, and paid the money and got a receipt. He did not get transfer, but remained in possession of the farm, and repeatedly asked Mr. Taylor for transfer. Taylor was Marais' man of business. Plaintiff was put off from time to time. They said the office in Cape Town was so large that it took a long time to get a reply to a letter. Six or seven months ago he took legal steps to have transfer carried through.

Cross-examined: On the 20th October, 1889, when he paid the first instalment, Marais signed the receipt. On 20th April, 1890, Mr. Taylor calculated the interest shown on the receipt, and Marais signed it. The receipt, dated 24th November, 1890, calculated the interest up to 20th October. Marais gave him no receipt on that occasion. Plaintiff told Marais he had paid Taylor the money.

By the Court: The bond was taken over, but plaintiff preferred to pay cash instead of taking over the bond. He knew that was contrary to the terms and conditions of sale. The conditions of sale did not say anything about payment by cash. Marais, however, at the very beginning told plaintiff he could pay the whole amount in cash. Marais went with him to Taylor's office on the payment of the first two instalments, but on the last occasion, when the £168 was paid, he did not accompany plaintiff. He could not account for this.

William R. Taylor, residing at Maraisburg, deposed that in 1889 he acted as agent for Marais. He was still acting for Marais. Had received moneys on his account, and had advanced him moneys. He had no books to show these transactions. He had no power of attorney from him.

He kept a rough cash-book. (Produced.) There was no entry under 14th April, 1890. On 21st April there was an entry of cash received from defendant, Government interest on bond, £8 14s. Before October, 1890, witness had received moneys on behalf of Marais. Any payments on behalf of Marais he would receive, because he was his agent. Witness drew the conditions of sale. He was then acting for Marais. He made the application to Government for this piece of land before it was sold. Remembered the payment of the first instalment. Myburgh was accompanied by Marais. He was not sure whether Marais took the money or left it with witness. On 20th April, 1890, the second instalment fell due, and Myburgh and Marais were again together, and witness wrote out the receipt. The bond which Marais had to pass to the Government was not passed. Towards the end of 1890—on 24th November—Myburgh came and paid the £168, the amount of the bond. Plaintiff was alone. Plaintiff said he had come to pay the last of the instalments. He said Marais had authorised witness to receive the money. He accepted it and gave plaintiff the receipt. Myburgh was staying with Marais. Shortly after the payment he told Marais that Myburgh had paid the £168. He had not rendered an account of this to Marais. He considered it was due to the Government, and he could not state what prevented him from sending the money to Government. He had not paid it to Government yet. No transfer was passed. The interest on the bond for 1890-91 was paid by witness.

Cross-examined: Was an agent of sixteen years' experience.

By the Court: Witness had been struck off the roll.

This closed the case for the plaintiff.

For the defence,

Daniel François Marais, defendant, deposed that in 1889 he sold this land to Mr. Myburgh for £850. The first instalment was paid in October, 1889, in Taylor's office. Witness received the money and signed the receipt and the documents. In April, 1890, the second instalment was paid by plaintiff's son. Witness told him that he had received all the money, and that his father would have to pay the bond to the Government. On that occasion witness signed the receipt and took the money. This occurred in Mr. Taylor's office. Witness never gave Mr. Myburgh permission to pay off the whole amount whenever he liked. He would consent to a payment to the Civil Commissioner. Myburgh never told witness that he was going to Taylor to pay the £168. Witness never told Myburgh to go to Taylor and pay the money. He gave him no authority whatever. The £168 belonged to the Government and not to witness.

Cross-examined by Mr. Juta: The bond was for

£168. He had to pay 4 per cent. interest to Government on the amount. Left everything in the hands of Taylor. The conditions of sale were that Myburgh was to take over the bond which witness must pass. Did not make any inquiry during 1890-91-92 as to what had become of the bond, because he understood Myburgh had taken over all liabilities. Taylor never told witness that Myburgh had paid the amount of the bond. He first heard of it through a solicitor in Cradock. Myburgh and witness were friends, but he concealed from witness the fact that he had paid Taylor the amount of the bond.—Q Do you mean to say that you never for three years inquired about a bond which was due by you to the Government?—A. I had signed the documents and thought all was right. I gave Taylor money to send to the Government, one amount of £40, but did not make any inquiry as to what he had done with the money for eight months.

This closed the case for the defence.

Mr. Schreiner, Q.C., was heard for the defendant. He referred to the case of the "Loan Agency and Trust Company v. Victor and Another" (Buch., 1889, p. 58.)

Mr. Juta was not called upon.

The Chief Justice said two facts had been clearly established—first, that the plaintiff had paid the £168 to Taylor; and secondly, that Taylor had defrauded someone of the amount which had been paid to him. The question now to be determined was: Who was to suffer for the fraud of Taylor? Was it plaintiff or was it defendant? Plaintiff's statement was that the first of two instalments payable under the conditions of sale was made at Taylor's office in the presence of Marais. It was in regard to the third instalment of £168 that the whole dispute now arose. The plaintiff produced a receipt which he received from Taylor on November 24, 1890. He stated that before he paid this money to Taylor he had the consent of the defendant to pay it to him. The conditions of sale stipulated that the purchaser (the plaintiff) should take over the bond of £168, which should in the first instance be passed by Marais. The person, therefore, primarily liable to the Government in respect of that sum would be Marais. Marais' version was that he never knew of this payment, and that he would not then have had sufficient confidence in Taylor to authorise him to accept the money from plaintiff. The Court had heard the evidence of plaintiff and of defendant, and the question was, which was the more reliable? In the first place, he was satisfied that the plaintiff would not have paid this money over to Taylor in the way in which he did unless he had first obtained the consent of Marais to substitute a cash payment for the bond. His lordship

was quite satisfied that plaintiff would have first consulted Marais, and plaintiff's version was that he did consult him. He was in the habit of visiting defendant at Maraisburg, and staying with Marais. On the day on which he made this payment he would naturally have stayed with Marais, and was it not probable that he would mention it to Marais in the first instance? It seemed to his lordship that a matter of this kind would not escape them. Probably it was a very important matter in the lives of both of them. At any rate it was a matter they would talk over, naturally, and to ask the Court to believe that plaintiff would have said nothing to Marais on the subject before he paid the money to Taylor, was really asking too much. But plaintiff went further, for he said that after he made the payment he told Marais. This was denied by Marais, who averred that during all the subsequent interviews he was never informed by the plaintiff of the money having been paid over. If the plaintiff, on the day he made the payment, told Marais that he had paid over the money, then naturally he would assume that Marais knew of the circumstance, and there would be no further talk about it. Marais said he never knew of anything until proceedings were taken, but his memory had clearly failed him. In 1890 his lordship believed Marais had most implicit confidence in Taylor. He subsequently discovered that Taylor was not deserving of that confidence, but of this he was not aware at that time. He trusted him with moneys to be sent to the Government—£40 on one occasion—and he (the Chief Justice) believed that defendant would also trust Taylor with the £168; and therefore, when he was asked by plaintiff whether the money could be paid to Taylor, his lordship was of opinion that Marais was quite willing to allow it. If he led Myburgh to suppose on the 24th November, 1890, that the payment to Taylor would be a good payment, then he would authorise the agent to receive the money. It had been contended by Mr. Schreiner that the Court had always attached more credit to written documents made at the time than to the statements of witnesses. But there was no written document here; there was only the entry made by the agent himself in his books. But that entry could not affect the question of credibility as between plaintiff and defendant. That entry, moreover, was not very conclusive on the subject. It was true Myburgh was credited, but it was cash to be paid to the Civil Commissioner. On whose behalf? Surely not on Myburgh's behalf. If cash was to be paid to the Civil Commissioner it was on Marais' behalf, and therefore that entry in the book out both ways. Under these circumstances the plaintiff was entitled to judgment, that with the consent of

Marais he had paid the full amount of £168, the last instalment of the purchase amount, and judgment must be given in terms of the prayer of the declaration with costs.

Their lordships concurred.

[Plaintiff's Attorney, G. Montgomery Walker;
Defendant's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 1898.
K.C.M.G. (Chief Justice), and { Feb. 16th.
Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

VAN DER VEEN V. LE ROUX AND ANOTHER.

Provisional sentence—Promissory note.

Mr. Schreiner, Q.C., moved for provisional sentence on a promissory note for £67 12s. 9d., due on the 8rd April, 1892.

The matter originally came before the Resident Magistrate's Court, Oudtshoorn, when the case was removed under Act 21 of 1876, section 3, to the Supreme Court on the application of the defendants' attorney, on the grounds generally that the matters involved would carry the case beyond the jurisdiction of the Resident Magistrate's Court. At the same time he tendered security for costs, and cited "Otto and Bekker v. Du Plessis" (4 Juts, 24).

On the 8rd February, 1890, the defendant, J. B. le Roux, passed a notarial bond for £580 in favour of plaintiff for moneys lent and advanced, which, in addition to the general clause, specially hypothecated all his right and title to certain shares of landed property accruing to him under the will of his parents and also by purchase from one of the co-heirs. In October, 1890, the plaintiff agreed with the defendant to modify and vary the said bond by allowing defendant to discharge his liability by ten annual payments of £60 each, together with interest, the first instalment to become due and payable on 1st November, 1891. This arrangement was concluded subject to the condition that the co-defendant, J. M. le Roux, interposed and bound himself as surety and co-principal debtor, which he did on the 27th October, 1890. Defendant was not able to meet the first instalment.

Defendant alleged in his affidavit that on 8rd December, 1891, he arrived at a settlement with the plaintiff, and that for the balance due to her

he passed his promissory note for £67 12s. 9d., which was signed by the co-defendant as surety and co-principal debtor, and was the note now sued on. Afterwards, on 29th April, 1892, the land specially hypothecated was sold in two sections, one of which was bought by Mr. Wannenberg for £262, and the other by Mr. Popta for £425; the auctioneer, Mr. Rudd, being a son-in-law of, and as it was alleged, agent for the plaintiff. The further facts appear from his lordship's judgment.

Mr. Searle appeared for the defendants, and the defence mainly urged was that plaintiff was bound to appropriate portion of the £262 to payment of the promissory note now sued on.

The Chief Justice said that defendants were sued upon a liquid document, and unless they could bring forward *prima-facie* evidence to lead the Court to believe that they would have a successful defence as against this liquid document, the Court ought to give provisional sentence. But it had also been proved that there was a distinct debt owing to the plaintiff upon a bond. After this bond had been passed, a further document was entered into—a deed of suretyship—by which the debtor on the bond was given time to pay the full amount in ten instalments. The plaintiff now said that all those instalments had become due by reason of an arrangement entered into between plaintiff and defendant, and he relied upon a paragraph in defendant's own affidavit in proof of this. It was not necessary to read that paragraph, because he (the Chief Justice) had already pointed out that in the next paragraph the defendant to a great extent modified the effect of the admission made in the eighth paragraph. The admission which was relied upon must be coupled with the further statement made by defendant that the plaintiff herself took the whole control of the sale of the property in question. If Cairncross in this case had not himself rendered an account to defendant by which the bond was treated not as owing, but as still payable by instalments, he (the Chief Justice) should have been inclined to give provisional sentence in the present case. But they must not lose sight of the fact that Cairncross had been the trusted agent of plaintiff throughout these proceedings, and that at the time the promissory note was made Cairncross was plaintiff's agent, and he would have been as well aware of the whole nature of the transactions between plaintiff and defendant as plaintiff herself was. Cairncross in his account treated the third instalment as not yet due, and he proposed to withhold the £61 which was in the hands of plaintiff for the purpose of paying the third instalment. That, in his lordship's opinion, should not have been done. He assumed that the plaintiff was entitled to the proceeds of this property for the purpose of paying

of the instalments already due. It did not follow that plaintiff was entitled to withhold any portion of those proceeds for the purpose of paying instalments not yet due, and this £51 being retained by plaintiff and not handed over to defendant, ought to be devoted towards the payment of the promissory note of £67 now sued upon. That would leave some small sum still owing to plaintiff, and possibly there might be interest, which would make up the amount. It was, however, a case which could not be decided upon a provisional claim. Certain allegations had been made which defendant ought to have an opportunity of proving. One of those was that Rudd was the authorised agent of plaintiff, and further, that defendant had told Rudd, as agent of the plaintiff, that the sum received, £262, must be devoted in the first place towards paying the promissory note. In all the circumstances, the Court would refuse provisional sentence to allow defendants an opportunity of proving the allegations in their affidavits.

Mr. Justice Buchanan concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buismann; Defendant's Attorneys, Messrs. Fairbridge & Ardenne.]

O'HARA V. ARTHUR GEORGE GILL. { 1898.
Feb. 16th.

Mr. Jones moved for provisional sentence on a promissory note for £11 18s. 2d.
Granted.

SMITH V. LE ROUX.

Mr. Maakew moved for judgment under rule 329 for £19 16s. 3d.
Granted.

SMITH V. JULY.

Mr. Maakew moved for judgment under rule 329 for £30 0s. 6d.
Granted.

BLAKE V. LANG.

Mr. Molteno moved for provisional sentence on a promissory note for £12 1s. 6d.
Granted.

REHABILITATIONS.

On motion from the Bar, the following insolvents were granted their rehabilitations: Adam E. Raubenheimer and David Davis.

REGINA V. SCHUNITZ.

On the motion of Mr. Giddy, the venue in this case was changed from the Supreme Court to the next Circuit Court to be held at Beaufort West.

GENERAL MOTIONS.

PETITION OF THOMAS C. J. BAIN.

Mr. Juta moved to make absolute the rule nisi for registration in petitioner's name of certain portion of the property Hasendal, situated at Rondebosch, measuring two morgen and 127.5 square rods, at present registered in the name of Edward Cobb Morgan.

Granted.

LARY V. LARY.

Mr. Molteno moved to make absolute the rule nisi admitting applicant to sue in *forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce. The defendant could not be found, notwithstanding that a publication had been made in the *Star* of Johannesburg. It was now sought to sue by edictal citation.

The Court made the rule absolute, ordered the same service as before, the citation to be returnable on first day of next term.

UNION BANK V. KING'S TRUSTEE.

This was an application for an order amending the list of contributories by substituting the name of Wm. F. Stamper as trustee of the insolvent estate for that of the said King, and declaring him liable in such capacity for all calls due on forty shares in the said bank belonging to the estate, and further declaring him liable *de bonis propriis* in respect of such calls for all assets in excess of the claims proved in the said estate, and for the costs of this application.

Mr. Schreiner, for the liquidators, applied for a postponement, and the Court ordered the case to stand over till Monday week.

ATKINSON V. ATKINSON.

Mr. Castens moved in the petition of Amy J. Atkinson for a rule nisi requiring her husband to show cause why she shall not be admitted to sue him in *forma pauperis* in an action for restitution of conjugal rights.

The Court granted the order, and made the citation returnable on the 12th April, personal service if possible, failing which one publication in the *Star* of Johannesburg.

PETITION OF ANNIE M. JONES.

Mr. Jones moved for the attachment *ad fundam jurisdictionem* of a plot of ground, marked No. 5, in the village of Aliwal North, in an action to be instituted by edictal citation against Annie N. Newman for the recovery of the amount of a mortgage-bond.

The Court granted leave to sue by edictal citation, personal service if possible, failing which one publication in the Bloemfontein *Express*, the citation to be returnable on the 12th April.

LOGAN V. READ AND ASH. { 1898.
Feb. 16th

Pleading—Amendment—Waiver.

Where, on the hearing of exceptions to a declaration, the plaintiff is allowed there and then to amend his declaration and no objection is taken to such amendment being made without previous delivery to the defendant of a copy of the amended declaration, such amended declaration will be treated as having been duly filed and no objection can afterwards be taken in respect of the non-delivery thereof to the defendant.

Mr. Juta appeared for the applicants (defendants), and Mr. Searle and Mr. Sheil for the respondent (plaintiff).

This was an application upon notice calling upon the respondent (plaintiff in the action) to show cause:

(a) Why the notice of trial of the above suit for the 22nd instant, given by the plaintiff, should not be set aside?

(b) Why judgment should not be signed against the plaintiff for not duly proceeding with the above cause, and why he should not pay the costs of the present motion?

(c) Why an order should not be granted authorising the Sheriff of this colony to pay to the defendants the moneys lodged by them as security for the claim made in the above suit, and the estimated cost thereof, to wit, the sum in all of £767 17s. 10d?

(d) Why in the event of this Honourable Court not granting the relief above sought or other relief, a commission should not issue authorising the evidence for the defence to be taken in England, and why the plaintiff should not pay the costs of this application?

The facts as appeared from the affidavits were as follows:

On 8rd March, 1892, the defendants were arrested, as they were on the point of leaving for England, upon a writ in which they were called upon to

show cause why they had not paid plaintiff the sum of £760, which it was alleged they owed to him in their respective capacities as captain and secretary of the English Cricket Team, and as such the representatives, managers, and administrators thereof.

The defendants found security in the sum of £857 17s. 10d., which sum is now in the hands of the Sheriff of this colony.

The declaration in the action not having been filed on the 8rd September last, the defendants on that day barred the plaintiff from filing his declaration, but by consent it was filed on the 17th September, after plaintiff had undertaken to go to trial in the following term.

The plea was subsequently filed on the 27th October, and an exception raised.

The replication was filed on the 24th November, after the defendants had given notice demanding replication on pain of bar.

On 21st December the argument on exception was heard, and allowed with costs, leave being given to amend the declaration by striking out the words "in their respective capacities as captain and secretary of the English Cricket Team, and as such the representatives, managers, and administrator of the said team."

On the 7th instant the defendants barred the plaintiff from filing an amended declaration, and served notice thereof upon the plaintiff's attorneys.

Thereafter, on the 7th instant, the plaintiff's attorneys served notice, setting down the above cause for trial on the 22nd instant. The defendants' attorneys now alleged that the result of the amendment of the declaration was to make a substantial variance between the original writ of arrest and the declaration as it now stood.

That no opportunity had been afforded to the defendants in accordance with the rules of Court to file an amended plea, or to take further exception to the declaration as it now stood, and that the declaration as amended had not been served in terms of rule 384.

Finally, that the defendants and their witnesses were all resident in England, and should the trial of the suit be proceeded with by the plaintiff, the defendants could not safely proceed to trial unless the Court should permit the evidence of defendants and their witnesses to be taken on commission in England, such evidence being material to the defence of the suit.

The plaintiff's attorney in his answering affidavit to the foregoing, alleged *inter alia* that the defendants' plea was also filed after they had received notice on the 5th October, demanding same on pain of bar.

That with reference to the leave to amend the declaration the amendment was made by the Court itself at the time, as would appear from the original plea filed with the Registrar, and further

that defendants were estopped, by their letter of the 22nd December, giving copy of the order of Court, taken out by themselves, from stating that they were not made aware of the amendment, or that service upon them of an amended declaration was necessary, nor did they at the hearing of the argument on exception apply for leave to amend their plea.

That defendants' attorneys in their letters, as well as personally, had intimated the necessity under which they were of having to apply for a commission to take evidence in England.

That it was the knowledge of this fact that deterred plaintiff's attorneys from setting the case down formally for trial, as they were in daily expectation of an application to consent to a commission until the notice of the 7th instant.

That should the Court accede to the application (c) of defendants' notices of motion, the plaintiff will be without remedy in this Court against the defendants, who are not resident within this jurisdiction, nor have they any other property or assets attachable *ad fundandam jurisdictionem* unless the Court impounds the sum now in the hands of the High Sheriff.

Mr. Juts was heard in support of the application, and contended that rule 384 had not been complied with. The declaration having been ordered to be amended, the proceedings commenced *de novo*. The writ showed no cause of action and should be set aside.

The Chief Justice said in the present case neither plaintiff nor defendants were in any hurry to have this case decided. Nearly a year had elapsed since the arrest, and yet they have not yet arrived at the stage of trial. If the plaintiff had not complied with the rules of Court, his lordship would have no hesitation in complying with the request of defendants, that the plaintiff should be debarred from any further proceedings. But the defendants had not satisfied him that there had been any such default on the part of plaintiff as would justify the Court in making the order. Mr. Juts had mainly relied upon the 384th rule, which provided that the judge might at any stage of the proceedings before trial, and the Court might at any stage before judgment, allow either party to amend his declaration or plea, as the case might be, and all such amendments should be made as might be necessary for the purpose of determining the real question or questions in controversy between the parties. Now when the exception was argued the Court was satisfied that the real question of controversy between the parties was not so much the question of agency, but the question whether Mr. Logan was a partner of defendants or not. That appeared to be the real question at issue between the parties, and the amendment in the declaration was made with the view that the real question should be

determined as speedily as possible. Now, however, it was contended that because an order for leave to amend was not served upon defendants that the plaintiff had been in default, and that time ought still to be allowed now to defendants for further pleadings. But it was everyday practice after a case had come into Court and it was found necessary that one of the parties should amend his pleadings that the Court granted leave, and it had never been held that it was necessary to allow fourteen days to elapse, and that a formal notice of amendment should be served on the opposite side. It was generally the practice for the Court there and then to allow the amendment, and if that was done without objection from the opposite party, then subsequent objections would be waived. Now, if the Court was right in ordering the amendment of the declaration, no further question could be raised in regard to the validity of the original arrest. The amendment to the declaration was sufficient to cover the writ of arrest, and if a corresponding amendment were made to the writ of arrest it was quite clear that there was cause of action against defendants, and they were properly arrested. Thus these formal objections fell to the ground. Then came the question as to the last prayer of this notice of motion, for leave to issue a commission for examination of witnesses. His lordship was satisfied from the correspondence that if this had been previously asked for the plaintiff would have readily consented. The correspondence showed that he was willing to consent, but he had to come to the Court for the purpose of objecting to the three first portions of the applicants' application. Under these circumstances the Court would grant the order appointing a joint commissioner in England to take the evidence of any witnesses who might be called on behalf of plaintiff and defendants, and would appoint Mr. Mackarness commissioner. The costs would be costs in the cause. Any costs of opposition must be paid by defendants. The Court authorised the Sheriff to pay the taxed costs of opposition of this application out of the funds in his hands.

[Plaintiff's (Respondent's) Attorneys, Messrs. Van Zyl & Buissinne; Defendants' (Applicants') Attorneys, Messrs. Fairbridge & Arderne.]

IN THE MATTER OF THE MINOR ANNA M. M.
J. KLEYN.

Mr. Searle moved for the appointment of a curator to represent the said minor in the sub-division of the landed property bequeathed to her and others by the will of the parents, and to mortgage the minor's share for the *pro rata* amount of the bond over the whole extent.

The Court made the order in terms of the Master's report, the guardian to be appointed curator.

CADLEY V. CADLEY.

On the motion of Mr. Schreiner, this case was allowed to stand over till the last day of term.

THEBON V. COLLETT. { 1898.
Feb. 16th.

Insolvency—Ordinance 6 of 1843, section 127—Will—Bequest—Execution.

Mr. Schreiner, Q.C., moved for an order that execution for the sum of £387 11s. 8d. do issue against respondent in respect of the deficiency in his insolvent estate, and that his interest in a certain bequest under the will of John Trollip and Martha Trollip be declared executable for applicant's claim.

The respondent's estate was sequestrated as insolvent on the 19th February, 1889. There was a deficiency in the estate of £387 11s. 8d. upon the first and final account, confirmed 18th January, 1890. Applicant was a creditor and the deficiency on his claim was £144 14s. 10d., and he alleged that the respondent was possessed of assets, and in particular under the mutual will of John and Martha Trollip, dated 29th January, 1890, he was entitled to a legacy of one-seventh of £2,500, and that it appeared from the account framed by the executors that there were sufficient assets in the estate to satisfy the legacy.

Mr. Schreiner, Q.C., referred to the 127th section of the Ordinance and to "Smith and Another v. Koetze" (Buch., 1874), and informed the Court that the applicant had only recently heard that respondent was entitled to the legacy.

The Chief Justice said if he had thought that in this case there had been any negligence on the part of applicant, he should have been inclined to give respondent the benefit of the lapse of time. But there did not appear to have been any negligence. This inheritance had only recently accrued, and application was made at once. Respondent had had three days since the service of the notice upon him, and if he had intended to oppose this application he would probably have appeared by this time or sent instructions by letter or telegraph. At the same time, it was not right to make a final order upon respondent, but the Court would give him an opportunity to appear and object to this order being made final. The Court would therefore grant leave to issue a writ of execution for the sum of £800 and costs of this application, with a stay of execution for fourteen days, and with leave

to respondent to apply to the Court within that time for the discharge of the order, notice of this order to be given to respondent. The Court further declared the respondent's interest under the will executable.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Fairbridge & Arderne.]

REGINA V. MAVUKWANA. { 1898.
Feb. 16th.

Native Territories Penal Code—Act 24 of 1886, section 198—Contravention—Mare—Identification—Conviction sustained on appeal.

This was an appeal from the conviction of accused before the Resident Magistrate of St. Mark's on a charge of theft of a mare.

The accused was charged with contravening the 198th section of the Native Territories Penal Code, Act 24 of 1886, in that upon or about the 1st September, 1892, and at Tsome in the district of Nqamakwe, he did wrongfully and unlawfully steal a bay mare, the property of Jantji Nyiki.

The mare was produced at the Court-house on the day of the trial and was identified by Nyiki as being his mare, which he had lost three months previously. One Arnett, a trader, deposed that the mare in question had been sold to him by the accused and his evidence was corroborated by his boy John Pleiss, who identified the mare—and also the accused. Arnett subsequently sold the mare to Pleiss from whom it was claimed by Nyiki.

The matter was then put into the hands of the Sergeant in charge of the C.M.R. camp at Bolotwa and he confronted the accused with Arnett. The accused denied all knowledge of Arnett and alleged that he had never sold him a mare. The accused was then arrested.

The defence set up by the prisoner at the trial was that the mare was not sold by him to Arnett, but that he had acted as interpreter for two men, who sold the mare to Arnett.

The evidence of accused was corroborated by his brother (Dambi), who swore that he was present when the sale took place and that the prisoner had merely acted as interpreter.

The opinions of the witnesses differed considerably as to the marks on the mare.

At the close of the evidence for the defence the prisoner's agent applied for a dismissal of the case on the grounds of want of jurisdiction of the Court seeing that the crime was committed at the Mhlahlana in the Nqamakwe district and terminated in Lady Frere district.

The Court ruled that Mhlahlana is on the boundary of St. Mark's district and refused the application.

The prisoner was then found guilty and sentenced to pay a fine of £20 and to be imprisoned for twelve months with hard labour.

The following are the Magistrate's notes on the case:

For some considerable time past, it has been known that stolen stock has found its way to the kraal of the accused's father Mavukwana, of Bolotwa, supposed to have been taken from all parts of the Transkeian Territories. The accused has escaped detection for a considerable time, but at last was identified by Mr. Arnott, of Bram Nek, as the person from whom he purchased Jantji Nyiki's mare.

There is no doubt in my mind that the evidence for the Crown is straightforward, whereas the defence set up that the accused acted merely as interpreter cannot be believed.

The accused is a resident of this district and the crime was committed at Tsomo, which is (Mhlahlana) the immediate boundary of this district, so that Mr. Kelly's (the agent's) exception (taken after pleading to the indictment and at the close of his defence) was not allowed, as the Court considered it had jurisdiction. The accused entirely failed to produce or even name the party for whom he acted as interpreter and agent.

The accused now appealed.

Mr. Juta was heard in support of the appeal, and contended that there had been no identification of the mare alleged to have been stolen. The Magistrate, from his reasons, appeared to have made up his mind that the appellant was guilty even before evidence had been taken. The case was a very doubtful one, and the prisoner should have had the benefit of it.

Mr. Giddy, for the Crown, was not called upon.

The Chief Justice said the witnesses who gave evidence as to the identity of the mare might not be able to describe the mare; at all events, they were agreed that the mare which was at the door of the court-house was the mare which the prosecutor had lost. They concurred that the horse was the horse sold by the prisoner. The defence set up in the Magistrate's Court was wholly different from the defence on appeal. There the defence was that the prisoner never sold the horse to Arnott, that someone else sold it, and that prisoner merely acted as his interpreter. The real seller was not produced. His name was not known. Now, however, it was contended in defence that there had not been a sufficient identification of the horse, but the mere fact that the witnesses made some mistake in describing the horse ought not to weigh against the fact that they all identified the horse

as the one which the prosecutor had lost. The only point which raised a doubt in his lordship's mind was the temper with which the Magistrate had approached the consideration of this case. He (the Magistrate) seemed to have taken it for granted that the man was guilty before proceeding to try him. That was hardly the judicial temper in which a case like that ought to be approached. Still, that was not a matter which ought to affect their minds if there was evidence to justify the Magistrate in finding the prisoner guilty, which apparently there was, and the appeal must therefore be dismissed.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT.

[Before Sir J. H. DE VILLIEB, K.C.M.G. (Chief Justice), and Mr. Justice BUCHANAN.]

PHILIP V. THE METROPOLITAN AND SUBURBAN RAILWAY COMPANY, { 1898.
LIMITED. } Feb. 17th.

Special damages—Specific performance—Declaration—Amendment—Pleading—Evidence—Sale of land—Breach of contract—Loss of profits—Interest—Wilful or fraudulent refusal to perform contract.

As a general rule, subject to certain specific exceptions, a plaintiff suing for specific performance of a contract of sale is not entitled, in addition thereto, to claim damages in respect of the profit which he would have made if the thing or land sold had been delivered or transferred in due time.

In an action for damages for breach of contract evidence is not admissible of any damages, which the law would not imply from such breach, unless the declaration contains an averment of the special damages sustained, or of such facts as would amount to a notification to the defendant that the evidence would be tendered.

Evidence of loss to the plaintiff of the use of the purchase price paid by him in advance held to be inadmissible in the absence of any averment of such loss, but it appearing that the defendant would not be prejudiced by the insertion of such an averment, the

Court authorised an amendment of the declaration so as to enable the plaintiff to claim interest on the money so paid in advance.

This was an action for damages instituted by William Alfred Philip, a partner in the firm of Philip Brothers, merchants, of Cape Town, against the Metropolitan and Suburban Railway Company. The declaration alleged that the plaintiff purchased from the defendant company a certain piece of land situate at the Amsterdam Battery, Cape Town, the property of the defendant company, for the sum of £1,500. That the plaintiff duly paid the purchase price, and all expenses of transfer and conveyance.

That by reason of the failure of the defendant company to pass the said transfer, the plaintiff had already sustained damages in the sum of £50.

That all things had happened, all times had elapsed, and all conditions had been fulfilled necessary to entitle the plaintiff to claim either that the defendant should pass transfer to him of the said property, and pay him the sum of £50 as and for damages by reason of his delay in passing the said transfer, or pay him the sum of £1,000 damages as and for breach of contract.

The plaintiff claimed :

(a) The sum of £50 as damages by reason of delay in passing the said transfer.

(b) That the defendant company be ordered to pass the said transfer or to pay to him the sum of £1,000 damages for breach of contract.

(c) Such alternative relief as might seem meet, with costs of suit.

The plea admitted the formal allegations in the declaration, and alleged that the company had passed and that the plaintiff had received transfer of the said land. It denied that plaintiff was entitled to claim the sum of £50, or any sum whatsoever, and prayed that plaintiff's claim might be dismissed with costs.

For a further plea, in case the above should be overruled, the defendant company alleged that they had always been ready and willing to pass transfer of the said land to the plaintiff, but that on the 12th November, 1892, the Court granted a rule nisi, operating as an interdict, restraining the defendant company from passing the transfer at the suit of the Imperial Government, which rule was subsequently extended pending an action to be brought by the said Imperial Government, from whom the land had been expropriated under Act 28 of 1889, and which proceedings were in February, 1898, withdrawn by the said Imperial Government, and the defendant company said that the plaintiff bought the said land with full knowledge that the said land had been so expro-

priated for railway purposes from the Imperial Government, and with full knowledge of and subject to any equities or rights which the said Imperial Government might have over the said land.

Wherefore the defendant company prayed that plaintiff's claim might be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Searle appeared for the plaintiff, and Mr. Juta for the defendant company.

John Yeoman, resident in Cape Town, partner with Philip Bros., deposed that he acted on behalf of Mr. W. A. Philip in the purchase of the property. He purchased it from Mr. Walker, acting for the company. The receipt for the money was got on 1st November. Witness had been negotiating for certain other land.—Q. You were very much in need of a timber store?

Mr. Juta objected to this question on the ground that it tended to prove special damage which had not been pleaded.

The Court sustained the objection.

Application was then made for leave to amend the declaration and allege special damage. This the Court declined to allow, nor would it permit evidence to be led as to the profits which plaintiff would have made if the land had been transferred within a reasonable time after the sale.

The plaintiff was, however, allowed to amend his declaration by inserting a claim for interest on the purchase price which had been paid in advance on the 1st November last.

Continuing, witness said in order to purchase the land the company borrowed £1,000 at 6 per cent. Had witness known that the land had been expropriated, or that there would have been any trouble about the matter, he would not have parted with his money.

Cross-examined by Mr. Juta: Q. Of course had we offered you £22 10s. last week when we gave you transfer you would not have accepted it?—A. No, I don't think I would.—Q. You expected to get £200?—A. I expected to get damages. Walker offered the land to witness in the ordinary way. Did not know it was Imperial property, even although he saw the battery there. Did not see the transfer before it was passed. Afterwards saw the transfer passed to the railway company, but did not read it carefully and did not know that the land had been expropriated, although that was, he subsequently discovered, stated in the transfer. Could not get transfer until the bond of £1,250 had been paid to the mortgagee.

Re-examined: Paid the money to Walker, and had nothing personally to do with the mortgagee.

Mr. Searle put in the correspondence and closed the case for the plaintiff.

Mr. Juta did not call any evidence for the defendant company, but was heard on the question

of damages, and cited *Mayne*, p. 168; "*De Bernales v. Wood*" (8 Camp, 288), and "*Farguhar v. Farley*" (7 Taunt., 592).

Mr. Searle, for the plaintiff, contended that the cases cited on the other side had reference only to contracts which had been wholly set aside, and had no application to the present case.

The Chief Justice said: The Court has refused to admit evidence as to the loss of profits arising from the defendant's delay in passing transfer for two reasons. *Firstly*, the general rule is that a purchaser suing for specific performance of a contract of sale is not entitled, in addition thereto, to claim damages in respect of the profits which he would have made if the thing or land sold had been delivered or transferred in due time (See *Voet* 19, 1, 20).

There may be exceptions to the general rule, as, for instance, where the defendant's refusal to perform his part of the contract has been fraudulent, but no such exception arises in this case.

The inability of the defendant company to transfer the land within a reasonable time was caused by the action of the War Department in obtaining an interdict restraining the company from transferring the land. That interdict has since been withdrawn, whereupon the company immediately tendered transfer to the plaintiff.

Secondly, the declaration contains no averment of special damages, or even of such facts as would amount to a notification to the defendant company that the evidence would be tendered.

Under our system of pleading unnecessary technicalities are not allowed to stand in the way of justice, but at the same time care is taken that undue laxity shall not create positive injustice. Whatever the English practice may be, a declaration filed in this Court must state, in terms of the 330th Rule of Court, "the nature, extent, and grounds of the cause of action, complaint, or demand." The demand now in question is for damages, and the only averment in regard to damages is that the plaintiff has sustained them.

There may be actions for breach of contract, as for instance for damages, in lieu of delivery of scrip, where shares sold have not been delivered within a reasonable time (compare *Lippert v. Adler*, 5 Juta, 898), in which the mere statement of the breach would be a sufficient indication of the nature of the damages sustained and claimed. This, however, is not an action of that nature. The greatest injustice might be done to a defendant by springing upon him at the trial evidence of damages the nature of which he could not reasonably have foreseen from a perusal of the pleadings.

The evidence tendered in the present case was that the plaintiff required the land for the special purpose of building a timber store, and that by reason of the delay in passing transfer he had been

deprived of certain profits. Even if such profits could be legally claimed as damages in an action for completion of the sale it would only be just that the defendant should have had some notification of the nature of the claim. An amendment may be ordered at the trial, but only if the defendant would not be prejudiced thereby.

An application has been made for an amendment of the declaration by adding averments to the effect that the plaintiff did on the 1st of November last pay in advance the purchase price of the property and that he has lost the use of the money from that date. The defendants cannot be prejudiced by this amendment because the payment clearly was a matter within their knowledge, they having moreover had the full benefit of it by being relieved of the payment of the interest on the bond which the money was used to satisfy. The Court will therefore allow the amendment on condition that it be considered as having been made at the time when the defendants tendered transfer of the land.

I am quite satisfied that to such an amended declaration the defendants would have tendered the interest in addition to the transfer.

The next question is whether upon such amended declaration the plaintiff is entitled to interest upon the money paid by him three months before the defendants tendered transfer.

In regard to the vendor of land, if he has given transfer and occupation of the land to the purchaser, he would be entitled to interest on so much of the purchase price as is payable from the date at which it became payable (See *Zeederberg's Trustees v. Zeederberg*, 4 Juta, 358). If while failing to give transfer and occupation within a reasonable time, he receives the purchase price from the purchaser and has the benefit of the money so received, there appears to me to be no reason in law why the purchaser should not, by way of special damage, be entitled to claim the interest on the money thus paid by him in advance.

The plaintiff in the present case had to borrow the greater portion of the money himself at six per cent. and the defendants were relieved from the payment of interest on their bond. The damages thus sustained by the plaintiff amounts to £22 10s.

The judgment will therefore be that the defendants do forthwith pass transfer of the land and pay to the plaintiff the sum of £22 10s. as damages, with costs up to the date of tender. Costs subsequent to the date of tender to be paid by the plaintiff.

Their lordships concurred.

[Plaintiff's Attorney, C. C. de Villiers; Defendants' Attorneys, Messrs. Wessels & Standen.]

VOSTER V. GOLDSBY.

On the application of Mr. Tredgold, the return day in the above matter was extended to the 12th April.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

STEENKAMP V. DE VILLIERS AND { 1898.
OTHERS. { Feb. 21st.

Mutual will—Adiation—Survivor—Vesting
—Legacy—*Jus accrescendi*—Testator—
Intention.

Husband and wife by a codicil to their mutual will bequeathed a farm, after the death of both of them, to their son "J." and made a further cumbrous provision, which the Court construed to mean, that in case another son should be born, he should take a half share in the farm and "J." the other half.

After the execution of the codicil and before the death of either testator another son "L." was born.

The testator died first and the surviving widow adiated.

Thereafter the son "J." died, leaving two children (the plaintiffs).

The surviving testatrix and "L." then transferred the whole farm to "R." who was aware of the contents of the codicil.

Held, that, whether or not the jus accrescendi applied to the legacy, "J." had, before his death, acquired a vested reversionary interest in one half of the farm and that the plaintiffs, as his heirs, were entitled to have the transfer of their father's share to R. set aside.

Held further, that, inasmuch as the codicil amounted in substance to a legacy of the farm, after the surviving spouse's death, to both sons in equal shares, the presumption was that the testators did not intend the jus accrescendi to apply.

This was an action for a declaration of rights,

instituted by Lucas Petrus Steenkamp and Johannes Benjamin van der Westhuizen, married to Johannes Benjamin van der Westhuizen (born Steenkamp), against Isabella Aletta de Villiers (as executrix of the estate of her late husband, Lucas Petrus Steenkamp), Martinus David Christian Ras, Lucas Petrus Steenkamp, Anna Magdalena Cloete (as executrix of the estate of her late husband, Gert Jacobus Cloete), Gert Jacobus Johannes Human Cloete, and Petrus Benjamin Wiese.

The declaration alleged that the first-named plaintiff and Johannes Benjamin van der Westhuizen (born Steenkamp) married in community of property to Johannes Benjamin van der Westhuizen were the children of the late Johannes Benjamin Steenkamp, and the grandchildren of the defendant Isabella Aletta de Villiers and her late husband, Lucas Petrus Steenkamp, senior.

That in the month of November, 1837, Lucas Petrus Steenkamp, senior, and his wife, Isabella Aletta (now the defendant Isabella Aletta de Villiers), executed a joint will by which each of the spouses appointed the survivor and the children his or her heirs, and in or about the month of March, 1848, the spouses executed a codicil by which they bequeathed their farm, De Abuyspoort, situate in Victoria West, after the death of both the spouses, to their two sons, Johannes Benjamin and Lucas Petrus Steenkamp, for the sum of 20,000 guilders, Cape value.

In 1858 the testator died without having revoked or altered the said will and codicil, and the widow adiated and accepted benefits under the said will and codicil and remained in possession and enjoyment of the said farm, and thereupon there became vested in the son, Johannes Benjamin Steenkamp, the right to half of the said farm upon payment of 10,000 guilders as aforesaid, subject to the usufruct of the widow, the said Isabella Aletta, who thereupon married a second time.

The said widow was duly confirmed in the appointment of executrix testamentary of her husband's estate and took out letters of administration.

In September, 1866, J. B. Steenkamp died intestate, leaving a son, the plaintiff L. P. Steenkamp, and eight months after his death a daughter was born, the wife of the second plaintiff.

In December, 1884, the first-named defendant, in her capacity as executrix testamentary, after having liquidated the estate and paid all debts, transferred half of the farm De Abuyspoort to her son, the defendant Lucas Petrus Steenkamp.

Thereafter, on or about the 20th September, 1895, the said executrix and the said defendant L. P. Steenkamp transferred a portion of the said farm, measuring 76 mor-

gem and 850 square roods, to Gert Jacobus Cloete, who in August, 1890, transferred it to Gert Jacobus Johannes Human Cloete, who in March, 1892, transferred it to the defendant Benjamin Wiese. The said transfers were not made under any judicial order or decree, but were made without the knowledge or consent of the plaintiffs or of the second plaintiff's wife, and each of the aforesaid Cloetes and the said Wiese have received transfer, not as *bona-fide* purchasers, but with full knowledge of the rights of the plaintiffs under the aforesaid will and codicil.

The said G. J. Cloete is dead, and the defendant Anna Magdalene Cloete is the duly appointed executrix in his estate.

In September, 1885, the said executrix, I. A. de Villiers, and the defendant L. P. Steenkamp partitioned the remaining extent of the said farm, and sub-divisional transfers were passed to each of them without the knowledge or consent of the plaintiffs or of the second plaintiff's wife.

In October, 1885, the defendant L. P. Steenkamp transferred the portion of the farm transferred to him previously as aforesaid to the defendant Martinus David Christian Ras, and in August, 1892, the defendant I. A. de Villiers sold and transferred the portion of the said farm transferred to her as aforesaid to the same defendant M. D. C. Ras. The said transfers were not made by virtue of any judicial order or decree, but were made without the knowledge or consent of the plaintiffs or the second plaintiff's wife, and the said Ras was not a *bona-fide* purchaser of the said portions of the said farm but bought and received transfer of them with full knowledge of the plaintiff's rights under the said will and codicil to half of the said farm.

The plaintiffs claimed, the second-named plaintiff by virtue of his being married in community of property to the daughter of the late Johannes Benjamin Steenkamp, to be entitled to half of the said farm De Abuyspoort, subject to the payment of the said sum of 10,000 guilden and to the life usufruct of the defendant I. A. de Villiers, and claimed that the aforesaid transfers passed as aforesaid were invalid and contrary to the rights of the plaintiffs and should be set aside, but the defendants denied the right of the plaintiffs to any portion of the said farm.

The plaintiffs prayed :

(a) For an order declaring them entitled to one-half of the said farm subject to the payment of 10,000 guilders on the death of the defendant Isabella Aletta de Villiers, and subject to her life usufruct, and for an order setting aside the aforesaid deeds of transfer.

(b) Alternative relief with costs of suit.

The defendants Ras and Wiese in their plea denied that at any time there became vested in Johannes Benjamin Steenkamp the right to one-

half of the farm referred to in the declaration. They did not admit that the transfers referred to in the declaration were made without the knowledge of the plaintiffs, and they denied that the Cloetes, Wiese, and Ras were, as alleged, not *bona-fide* purchasers, and that they bought with full knowledge of any alleged rights vested in the plaintiffs under the said will and codicil.

The defendant Ras specially pleaded that as to the transfer of one undivided half of the said farm in December, 1884, and as to the sub-divisional transfer of a defined portion in September, 1885, and as to the transfer thereof to the said Ras in October, 1885, that the said transfers were effected in due and proper form of law and pursuant to the terms of the codicil, whereon the plaintiffs relied, the defendant I. A. de Villiers having renounced her usufruct and passed transfer in favour of her son, the defendant L. P. Steenkamp, and he having duly passed transfer to the defendant Ras in October, 1885, as set forth in the declaration.

The defendant Wiese specially said that the transfer to him in March, 1892, of a defined portion of the said farm from the defendant Gert Jacobus Johannes Human Cloete, was effected in due and proper form of law, and that as to half of the portion so transferred the said half was duly transferred by the defendant Lucas Petrus Steenkamp as legatee under the said codicil to the late Gert Jacobus Cloete.

The defendants Isabella Aletta de Villiers as executrix of her late husband's estate, Lucas Petrus Steenkamp, Anna Magdalena Cloete as executrix of her late husband's estate, and Gert Jacobus Herman Cloete, all submitted themselves to the judgment of the Court, and prayed that they might be held harmless in the matter of costs in any event.

The defendants Ras and Wiese prayed that the plaintiffs' claim might be dismissed with costs.

The replication was general, and upon these pleadings issue was joined.

The codicil to the will referred to in the pleadings was in the following terms: *By virtue of the reservatory clause hereinbefore inserted in this our testament, and granted to us, we both the testators declare it to be our last will and desire that our residence named De Abuyspoort, situate in the ward Winterveld, in the district of Beaufort, is hereby and by these presents bequeathed by both of us, and after the death of both of us, to our son named Johannes Benjamin Steenkamp for a sum of 20,000 guilders, Cape currency.*

And in case another son be procreated and born in this present marriage, the above-mentioned farm shall belong to him as his lawful property, as well as to our before-mentioned son, also for the same sum of 20,000 Cape guilders, and in case, after the death of both of us, the said farm and lawful property of our

son afore mentioned, and who may still be born after the date of these presents be granted, neither of them shall ever have the right if he desires to relinquish his share to sell, dispose of, or alienate the same to a stranger, but to his brother, for the same sum for which it has been bequeathed to him in this our testament.

Mr. Juta and Mr. Jones appeared for the plaintiffs, and Mr. Schreiner, Q.C., and Mr. Graham for the defendants.

Lucas P. Steenkamp, one of the plaintiffs in the action, deposed that he was a son of the late Johannes Benjamin Steenkamp, and grandson of Mrs. De Villiers, the defendant. He was born in 1866. In 1886 he was living with Van der Westhuizen, sixteen hours from De Abnyspoort. Went with Van der Westhuizen to De Abnyspoort. His grandmother sent for them to divide the ground. His uncle, Lucas Steenkamp, Piet Wiese, Andries Wiese, Marthinus Ras, Hendrik de Villiers, and Cloete and his brother-in-law were present. They all went on to the ground with the land surveyor, and the ground was divided in half portions. Witness chose the portion adjoining Andries Wiese's place. Piet Wiese was also a neighbour. The land surveyor made the division line. His grandmother told him he was to choose the upper portion, because she wanted to live there herself. Witness knew that Lucas Steenkamp, his uncle, had sold to Ras. He (Ras) took the portion he bought from Steenkamp. Witness's grandmother went to live on the portion she had fixed upon. Witness afterwards had a visit from his grandmother, who wanted to buy the ground. They could not agree upon a price, and in 1888 witness sold it to Andries Wiese, £500 to be paid in February, 1889, and £1,000 after the death of the grandmother. In January, 1889, he went for the money, and on the way called on Marthinus Ras. Ras said, "Had I known you were going to sell I should have bought it." Witness proceeded on his journey, and got the £500. After 1889 the half-share was transferred to Ras, and as soon as he heard of it he (witness) protested to his grandmother. He threatened to cancel the sale, and she said, "You can sue me." Ras would not have the sale cancelled, though witness believed his grandmother was willing to cancel it.

Cross-examined by Mr. Schreiner, Q.C.: The surveyor set off the part that was going to Cloete, 76 morgen, running into their ground and convenient to their buildings. With regard to the arrangement with Wiese, it was understood that he was to pay witness £600 more and bear the risks of the action. Wiese had still £100 to pay and the costs of the action.

Johannes Benjamin van der Westhuizen deposed that he was married to Johannes B. Steenkamp, and in 1886 he accompanied the rest of the family to the farm. It was to be divided between

witness and his brother-in-law and Uncle Lucas. In June, 1889, he went with his brother-in-law to fetch the money. Saw Marthinus Ras. The ground was mentioned and Ras expressed a desire to have it. No more passed. Some time after, probably in October, 1892, Mrs. De Villiers told witness she had transferred a portion to Ras.

Andries Wiese deposed that he was present when the partition took place. Knew that Marthinus Ras had bought Lucas Steenkamp's piece. Ras knew about the codicil relative to the ground witness bought in 1888. Witness was in the Free State in October, 1892, and heard of the transfer to Ras.

Cross-examined: Was brought up for trespass by Ras in 1890, and the Magistrate gave damages against him. He was responsible for the costs of the action now before the Court.

By the Court: Under the contract he had to pay £1,500. He considered the value of the farm £1,500. If they lost their case they were to repay witness the £500.

This closed the case for the plaintiff.

Mr. Schreiner said, in view of the limitation which his learned friend had put upon the case, he did not think it necessary to call any witnesses for the defence.

Mr. Juta was heard in support of the plaintiffs' case, and contended that a usufructuary, and not a fiduciary, interest had been created, and consequently on the death of the testator the property vested in the sons. He cited "*Rahl v. De Jager*" (1 Juta, 88), and "*la re Zipp*" (decided in December, 1878, not yet reported).

Mr. Schreiner, Q.C., admitted that a usufructuary interest was created, but contended that the interest of the sons was joint only and not joint and several, consequently the *jus accrescendi* applied, so that on the death of the son Johannes the whole farm vested in the son Lucas, and as he did not object the transfers could not be set aside. He cited "*Rahl v. De Jager*" (1 Juta, 88) "*Breda v. The Master*" (7 Juta, 360); "*Booyesen v. Trustees Colonial Orphan Chamber*" (Foord, 48); "*Lange v. Liesching*" (Foord, 55).

The Chief Justice said: No question arises in this case—as so often does in cases arising out of mutual wills—whether the surviving spouse has accepted benefits under the will.

On the defendant's behalf it has been candidly admitted that the surviving widow is bound by the provisions of the will executed by herself and her deceased husband.

It is contended, however, that the plaintiffs' father Johannes Steenkamp, having died before the surviving widow, took no vested interest in the legacy capable of transmission to his children as his heirs, and that the form of the legacy was such as to create a *jus accrescendi* in favour of his brother and co-legates, Lucas Steenkamp. If this

contention is correct, it is obvious that the surviving widow as executrix of the deceased and as usufructuary of the farm bequeathed, was justified in selling the whole of the farm, with the consent of Lucas, to the defendant Ras. If the contention is untenable it is equally obvious that, inasmuch as Ras had full knowledge of the contents of the will before he purchased, the transfer of the share bequeathed to Johannes cannot stand. What, then, are the terms of the codicil? "*We, both the testators, declare it to be our last will and desire that our residence named 'De Abuyspoort' is hereby bequeathed, by both of us, to our son Johannes for a sum of 20,000 guilders. And in case another son be born in this marriage the farm shall belong to him as his lawful property, as well as to our afore-mentioned son, also for the same sum, and in case after the death of both of us, the said farm and lawful property of our son, and who may still be born, be granted, neither of them shall ever have the right, if he desires to relinquish his share, to alienate the same to a stranger, but to his brother, for the same sum for which it has been bequeathed to him.*" Lucas was born afterwards, and the question to be determined is whether upon the death of the testator each of the legatees, Johannes and Lucas, took a vested interest in a half-share of the farm conditional upon the payment of the sum fixed by the codicil. In my opinion the survivor, after addition, retained only a usufructuary interest in the farm. In whom then was the proprietary interest? Surely in the two legatees in equal shares. This was a transmissible interest which upon the death of Johannes passed to the plaintiffs as his heirs (See *Rahl v. De Jager*, 1 Juta, 88.)

The argument has, however, been complicated by the contention that the *jus accrescendi* applies to the legacy. Even if it did apply, it could not affect the question of vesting. The mutual will, so far as it affected the joint property, spoke from the date of the testator's death. The surviving widow might have repudiated it and claimed her half-share, in which case only the reversionary interest in one-fourth of the farm "*De Abuyspoort*" would have vested in Johannes, but she elected to abide by the will and accept benefits thereunder. She thus consented to accept only a usufructuary interest in the farm in question, but the proprietary interest, as I have already remarked, became vested in both her sons. If the *jus accrescendi* did apply the effect would be, independently of such vesting, that the share of Johannes would lapse and fall into the residuary estate, but, as the point has been pressed, a few remarks upon it will not be amiss.

There is no point of law upon which there has been more vehement discussion amongst the Dutch lawyers than upon this. Decker in his notes to Van Leeuwen's Roman-Dutch Law (8. 4. 8), grows quite warm over Voet's statement (80. 1. 61) that,

where the testator has bequeathed [the same thing in one and the same sentence or connection to two or more persons in defined shares, the legal presumption is that he did not intend, in case of failure of one of the legatees, that the remaining legatees should take the whole legacy. Decker strenuously contends for the application of the *jus accrescendi* in such a case and he cites a host of authorities in support of his contention.

He admits that this right of accretion is entirely based upon the presumed intention of the testator, but, while objecting to some of the subtleties of construction in the Roman law, he introduces other subtleties which seem altogether to defeat the testator's probable intentions. If, in the present case, the testators had in one part of the will simply bequeathed the farm to Johannes, and in another part to such son as might thereafter have been born, without any other indication of a desire to give each a separate share only, then, the joinder of the legatees being in regard to the thing bequeathed only *re tantum*, the presumption would have been irrebuttable that the testators intended the surviving legatee to have the whole farm.

The same presumption would have existed if, without any other indication of intention, they had bequeathed the same farm in the same sentence to Johannes and such other son as might be thereafter born, and thus joined them *re et verbis*.

If the testators had said, "*We bequeath the farm 'De Abuyspoort' to our son Johannes and to such son as may be thereafter born in equal shares*" then the joinder would have been in words only (*verbis tantum*), and according to Voet (80. 1. 61), whose authority this Court has hitherto in this respect followed, there would have been no right of accretion.

Substantially this is what the testators have said in the present case. The language actually used is cumbersome, but it would seem to indicate an intention that each son should take a distinct share in the farm and therefore, in my opinion, the *jus accrescendi* would not apply.

But whether it does apply or not Johannes had a vested interest in one-half of the farm before he died.

The testatrix, with the knowledge of Ras, was guilty of a breach of trust in transferring the share of Johannes to Ras.

The Court is therefore not bound to confine the plaintiffs' remedy to damages but may set aside the transfer.

There is no claim for damages, and the Court will therefore order that the transfer be set aside. The sum payable by the legatee will of course have to be paid before the plaintiffs can claim their father's share of the farm upon the death of the testatrix.

As to costs—which is often the most difficult question to decide in a case—they must be borne

by the defendants Mrs. De Villiers and Ras, except such costs as the remaining defendants necessarily incurred by reason of being joined as co-defendants, which must be borne by the plaintiffs.

Mr. Justice Buchanan concurred, and on the question of notice, which was so frequently argued in such cases, referred counsel to the 397th section of Storey's Equity Jurisprudence.

Mr. Justice Upington concurred.

[Plaintiffs' Attorneys, Messrs. Van Zyl & Buissonné; Defendants' Attorney, W. E. Moore.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

FAGAN V. GOUS. { 1893.
Feb. 23rd.

Provisional sentence—Promissory notes —
Defence—Payment—Evidence.

Mr. Graham moved for provisional sentence for £249 12s. 6d., due on two promissory notes, each bearing date 26th September, 1885, and payable at Tulbagh, in the office of the late Henry Allan Fagan, made and signed by the defendant in favour of the said Fagan, with interest thereon from the 26th September, 1885, less the sum of £100 paid on account in August, 1890.

Mr. Schreiner, Q.C., appeared for the defendant, who pleaded payment of the notes now sued on, and alleged in his affidavit that in 1884 he bought two wagons from one Verster, a wagonmaker of Tulbagh, for which he gave Verster two promissory notes amounting to £180.

That Verster subsequently became insolvent, and that the late Fagan bought the aforesaid two promissory notes in the insolvent estate for £15 (as he (defendant) was informed), and that he received notice from Fagan that the notes were payable to him.

That in September, 1885, defendant went to Tulbagh and paid the said Fagan £100 on account of the two promissory notes, and Fagan then stated that defendant still owed him £149 12s. 6d., for which he made defendant sign a promissory note payable on demand. After the defendant had signed the said promissory note, Fagan remarked that he was not satisfied with the said note, and that defendant should have paid him more on account and insisted that defendant should reduce his indebtedness to

£100, whereupon defendant promised to try and see what he could do. That the next day defendant paid Fagan £49 12s. 6d. and signed a fresh promissory note for £100, and that this was one of the promissory notes now sued on.

That Fagan retained both the old promissory notes in favour of Verster, as well as the one in his favour for £149 12s. 6d., and promised to destroy them, but that now defendant was sued on the last-mentioned note.

Defendant further said that about three years ago he held a sale of cattle and sheep at Klapmuts. At the sale Mr. Henry Fagan, jun., son of the late Henry Allan Fagan, came to defendant and informed him that his father had sent him to claim payment of the promissory note for £100 and all arrear interest; that defendant told him that he was not in a position to pay him the £100, but that he would settle the interest, which he did, paying compound interest, and promised to settle the capital after settlement of the vendu roll.

The said Henry Fagan stated that he had instructions to place an interdict on the vendu roll, but defendant questioned his right.

That whilst discussing the matter Mr. Graaf came up, whereupon defendant asked him if he would deposit £100 to the credit of Mr. Henry Allan Fagan in the Standard Bank, which the said Graaf readily agreed to do.

That the said Graaf had duly paid £100 to the credit of Mr. H. A. Fagan, and that he held the bank's deposit receipt.

Lastly, defendant said that he had paid the promissory notes on which he was sued, and that he had been compelled at great expense to come to Cape Town to defend this action.

Mr. Henry Fagan, jun., son of the late Mr. H. A. Fagan, in his affidavit, denied the statements made by the defendant, and detailed the circumstances under which the two promissory notes were given.

Attached to his affidavit was an extract from his father's ledger, showing a debit balance against the defendant of £149 12s. 6d.

Mr. Schreiner, Q.C., was heard for the defendant, and contended that the case was not one upon which provisional sentence would be granted. As to the extract from the ledger produced, that could not be used as evidence against the defendant.

Mr. Graham for the plaintiff. The following authorities were cited in argument: "Haupt's Executors v. Jones" (Buch. 1874, p. 128); "Executors of Schoonberg v. Executors of De Vos" (1 Juta, 225); "Watermeyer v. Neethling" (1 Menz, 26).

The Chief Justice said the plaintiff in this case sued upon two promissory notes, which were produced, and which seemed to be in perfect form.

The defence was payment. But no document whatever was produced to show that payment of any portion of the sum had been made. The defence as set up really amounted to a charge of gross fraud against the deceased. It was a fraud to which his bookkeeper and his son must have been parties, if this defence was correct. The probabilities of the case certainly appeared to be strongly in favour of plaintiff, and the only point urged in favour of defendant was the antiquity of these two notes, both being dated September 26, 1886. But it had been stated by Mr. Fagan, jun., that his father was not in the habit of suing debtors, and at all events it was clear that in 1890, before his father died, defendant was pressed for payment, so that the defence of antiquity was entirely superseded by the fact that before Mr. Fagan died he recognised both notes as still being owing by defendant to him, and sent his son to Klappmuts for the purpose of recovering the amount due on them. Under these circumstances it was sufficient to say that the probabilities being entirely in favour of plaintiff provisional sentence would be granted.

[Plaintiff's Attorney, G. Montgomery Walker;
Defendant's Attorney, C. C. de Villiers.]

WOLFF'S EXECUTOR V. PRETORIUS.

Mr. Rubie moved for provisional sentence upon a mortgage bond for £200 with interest.
Granted.

RAWSTORNE V. VAN DER MERWE.

Mr. Schreiner, Q.C., moved for provisional sentence for £72 interest due on a mortgage bond, and for £4 13s., being the premium paid upon a fire policy.
Granted.

ALIWAAL BOARD OF EXECUTORS V. LOWRY.

Mr. Watermeyer moved for provisional sentence upon a mortgage bond for £60, and for £6 5s. 9d., being the amount of Municipal rates.
Granted.

HINE V. BROWN.

Mr. Sheil moved for the final adjudication in defendant's estate. The provisional order was granted on the 15th inst.

The Court made the order.

HUGHES AND CO. V. JAMES.

Mr. Buchanan moved for judgment under rule 329 for £100.
Granted.

Ex parte SHIPPARD.

Mr. Juta moved for the admission of Mr. Courtenay O. Shippard as an advocate.

Mr. Shippard took the oath and was duly admitted.

ZURING V. ZURING AND DIRKSE. { 1898. Feb. 23rd.

Mr. Tredgold appeared for the plaintiff; the defendants were in default.

This was an action for divorce, instituted by Karl W. Zuring against his wife, on the grounds of her adultery with one Dirkse, against whom damages were claimed.

Karl William Zuring, plaintiff, in answer to Mr. Tredgold, deposed that he was a labourer and resided at Claremont. On 19th February, 1888, he married the defendant. After the marriage he and his wife lived at Claremont for eighteen months, when his wife left him and went to live with her father. In 1885 plaintiff went to Kimberley, leaving his wife behind. She took up with one Dirkse and they were living together at Woodstock. There was one child of the marriage, a girl; he had the custody of the child and he wished to retain it.

By the Court: His wife was a minor when he married her. He could not say whose consent was obtained. He thought the consent of her sister was given.

The Chief Justice said he had just been looking into the Marriage Ordinance to see whether the clergyman was liable to any penalty. In the marriage certificate it was stated that the father of the bride was in Namaqualand at the time of the marriage, but nothing had been heard from him; and that the mother was dead. It was a Rev. Mr. Gohl who married these people under these conditions. The law was express on the point that in the case of a minor where the consent of the parents was not given the consent of the Chief Justice must be obtained. The marriage had been preceded by the publication of banns, so that the minister who solemnised it was not liable to any pains or penalties. Still, the Court would have to hear his explanation why he solemnised the marriage without the requisite consent. They took it, however, that the marriage had been duly proved.

Sophia Fraser deposed that the plaintiff and defendant were married in her house. Mrs. Zuring was now living with Dirkse at Woodstock, and she had four children by him. Dirkse worked on the railway as a labourer.

Christina Julison deposed that she lived in the same house with Mr. Dirkse and Mrs. Zuring. Mrs. Zuring had four children by him. Witness believed they occupied the same room.

The claim for damages was withdrawn.

The Court granted a decree of divorce (plaintiff to have the custody of the child), and ordered the co-defendant Dirkse to pay the costs of the action.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne.]

GENERAL MOTIONS.

Ex parte POOLEY—IN THE INSOLVENT ESTATE OF ISABELLA S. O'CONNELL. { 1898.
Feb. 28rd.

Insolvency—Trustee appointed in Griqualand West—Application for confirmation—Act 39 of 1877, section 13.

Mr. Graham moved for the confirmation of the appointment by the High Court of John Pooley as trustee in the said estate, for the purpose of enabling him to give transfer of a piece of land, the property of the estate, situated beyond the jurisdiction of the said High Court.

This was the petition of John Pooley, of Kimberley, in his capacity as the sole trustee of the insolvent estate of Isabella S. O'Connell, formerly McLachlan, trading as Greatbatch & Co., at Kimberley.

The petitioner was appointed sole trustee by order of the High Court, dated 15th January, 1892. Amongst the assets of the said estate there was a certain lot of ground with a building thereon, marked No. 64, situate in New Church-street, Cape Town, recently sold by petitioner in his capacity as trustee for the sum of £400, transfer of which had now to be given to the purchaser.

On transfer being tendered, the Registrar of Deeds declined to pass the same on the grounds *inter alia* that petitioner, although appointed, such sole trustee, had under his appointment no power over any landed or fixed property situate outside the jurisdiction of the High Court of Griqualand West, but that if petitioner got his appointment as trustee confirmed by the Supreme Court, he (the Registrar of Deeds) would have the deed of transfer passed and registered in due course and according to custom and usage.

The petitioner therefore prayed that the Court might confirm his appointment of the 28rd January, 1892, as such trustee, for the purpose specially of giving transfer of the aforesaid lot of ground with building thereon so sold as aforesaid for the sum of £400.

The report of the Registrar of Deeds was in the following terms:

The third paragraph in the petition correctly states the position I took up when transfer was sought to be passed. The second proviso to

section 18 of Act 39 of 1877 does not refer to the appointment of trustees in insolvent estates, and true copies are not forwarded to the Master of the Supreme Court for registration, as is done in the case of letters of administration, *vide* "Chalmers, N.O. v. Francois" (1 App. Court, 209).

¶ The petition having been read, following cases were referred to: *In re* "Firbank, Pauling & Co." (4 Juta, 387), and "Richards v. Doveton's Trustees" (8 Juta, 128).

The Court confirmed the petitioner's appointment as trustee.

[Petitioner's Attorney, C. C. de Villiers.]

ABRAMS V. ABRAMS.

Mr. Sheil, for applicant, moved for leave to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, or otherwise for divorce.

Referred to counsel.

MULLER'S EXECUTORS AND HEIRS V. WILLIAMS.

Mr. Searle moved for a rule *nisi* requiring Uriah R. Williams to show cause why an agreement entered into by the heirs in the said estate, in regard to the transfer to them of a certain farm called Tweefontein, in the district of Humansdorp, shall not be carried into effect.

The Chief Justice said there was a sufficient *prima-facie* case disclosed by the Master's report to justify the Court in granting the rule, which would be made returnable on 18th March.

STADLER V. MARITZ.

Mr. Searle for plaintiff; Mr. Juta for defendant.

This was an application to make absolute the rule *nisi* for the amendment of the valuation made of the landed property and live-stock in the estate of the late Franz Jacobus Maritz.

After argument,

The Court made the rule absolute, substituting £1,800 for £2,000 as the value of the farm, with costs, the applicant to pay the costs of the original application.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 1893.
Justice BUCHANAN, and Mr. Feb. 24th.
Justice UPINGTON, K.C.M.G.]

IN THE MATTER OF CHRISTINA S. CALITZ.

Mr. Searle moved for the appointment of a *curator ad litem* to represent the said Calitz, an alleged lunatic, in proceedings about to be instituted in the next Circuit Court at Ondtahoorn to have her declared of unsound mind.

The Court appointed Mr. Swemmer as *curator ad litem*, and made the summons returnable at the Ondtahoorn circuit.

PRINCE, N.O. V. ZOER AND ANOTHER. { 1893.
Feb. 24th.

Mr. Schreiner, Q.C. for defendants; and Mr. Searle for plaintiff. This was an application for an order requiring the plaintiffs and the officers of the company represented by him to make discovery on oath of all documents relative to their dealings with one Herman Klosser, and for the postponement of the trial of the case until some affidavits shall have been made.

The Court appointed a commissioner to examine Dull and Dresselhuys and such other witnesses resident in Holland as either party might produce in reference to the matter. The costs of the commission and of this application to be costs in the cause, the trial of the case to be postponed until the proceedings at the commission had come to hand.

LOWW AND CO. V. LAUBSCHER. { 1893.
Feb. 24th.

Contract of sale — Conditions — Breach — Damages.

This was an action instituted by Jacob Petrus Louw, trading as J. P. Louw & Co., against Mathys Laubscher for £40 damages, alleged to have been sustained by defendant's breach of contract.

The declaration alleged that on or about the 2nd August, 1892, the defendant agreed to sell and the plaintiff agreed to buy from the defendant (a) seventy oxen at the price of £7 10s. each, and (b) ten oxen at the price of £7 each.

That the said oxen formed part of a troop of about 100 oxen of the defendant's, which were then on the road towards Piquetberg-road Station, and it was agreed that the plaintiff should pick up

and take delivery of the aforesaid eighty oxen on the arrival of the troop at the defendant's farm.

That thereafter the defendant, in breach of his agreement, sold the said troop of oxen to another person or persons at an advance price, and refused to carry out his agreement with the plaintiff. That the plaintiff had sustained damages in the sum of £40 by the said breach of the agreement. The plaintiff claimed the sum of £40 as damages, with costs of suit.

The defendant, in his plea, said that on or about August, 1892, and at the farm Leeuwlei, near Piquetberg-road Station, he made an agreement with the plaintiff that he would sell to him certain oxen, eighty in number, at the prices referred to in the declaration, portion of a troop of oxen which had been recently bought for defendant, and which he was about to meet shortly, provided that he (the defendant) could get no higher offer for the said oxen than the said prices, and it was arranged between the parties that if the defendant obtained such higher offer, he would give plaintiff the option of purchase at the price so offered, and that defendant should inform the plaintiff when he met the said oxen whether he was able to obtain a higher price than that mentioned in the declaration, and whether the said provisional agreement should be confirmed or not.

That thereafter, at Van Rhyn's Dorp, the defendant met the said oxen, and obtained a higher offer than the price mentioned in the declaration from Messrs. Combrink & Co., whereupon he communicated with the plaintiff, who refused to make any advance upon his original price offered.

That thereafter the defendant, as he was entitled to do, sold the said oxen to the said Combrink & Co.

The defendant denied that any concluded agreement of purchase and sale was ever entered into. He admitted that he had sold the oxen at a higher price than that offered by the plaintiff. He denied that the plaintiff had sustained damage in the sum of £40, or in any sum, by any acts or conduct of him (the defendant), wherefore he prayed that the plaintiff's claim might be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Schreiner, Q.C., and Mr. Graham appeared for the plaintiff, and Mr. Searle and Mr. Buchanan for the defendant.

Jacobus Petrus Louw, cattle-dealer, Mowbray, plaintiff, deposed that he had an agent (Mr. Hoffman) at Van Rhyn's Dorp, who represented him there. In July he received information from him about a troop of oxen which was on its way to Piquetberg-road. Knew Mr. Laubscher, the defendant, and went up to Piquetberg-road. On 2nd August rode over to defendant's farm and saw him. He

was asked to off-saddle. They spoke about the oxen that were coming forward. The previous year plaintiff had bought some oxen from him. The oxen he was shown that day—sixty-five in all—were part of the troop he bought last year. Defendant showed witness a letter, and witness told him that the market price was £7 10s. at that time. Laubscher said to witness he would take £7 10s. for seventy, and ten at £7 each. Witness told defendant it was a bargain, and asked him to come over to the hotel in the afternoon. Witness went back to the station, and sent a wire to Hoffman informing him that he had bought eighty oxen, and asking him when they could be received. Mr. Laubscher afterwards came over to the station, and they spoke about the transaction. They parted on good terms, and on the 4th he received a note from Mr. Laubscher saying he was going himself for the oxen. He subsequently heard from Hoffman to the effect that the oxen had been sold to someone else. He saw Laubscher on the 11th August, and asked him why he had sold the oxen. He said, "I went to your man and he would not give me a higher offer." Witness said, "My man has nothing to do with it. I bought the oxen." He said, "I'll make it alright with you some day." Plaintiff remonstrated and left him.

By the Court: He did not put the bargain on paper. He did not ask Laubscher if he would take a note. Most of these transactions were conducted verbally.

Examination continued: He never saw the cattle at any time. They were a good distance away at Van Rhyn's Dorp. The price paid was a fair average price on the market. He considered himself damaged to the extent of 10s. per head on the eighty cattle, amounting in all to £40. He could have made a profit of £1 10s. in the market.

Cross-examined by Mr. Searle: Defendant told witness that sixty-five of the cattle were part of a troop that had come from Namaqualand. Witness told Laubscher that the market price was £7 to £7 10s. on the 2nd August. On the 5th or 6th the price had gone up to £8 10s. Plaintiff was anxious to buy the oxen but did not press Mr. Laubscher to sell. Did not know that Mr. Laubscher was going up to Van Rhyn's Dorp to see the oxen. That is a journey of about three days. He went to see Basson, his sick servant, not to see the cattle. Provisional arrangements of the kind suggested were not common among cattle dealers. He sometimes gave a present after the bargain was closed if the cattle turned out well. Laubscher did not ask plaintiff, "Have you wired to Hoffman that it is a provisional sale or an out-and-out sale?" Witness was buying a good many oxen about this time. There was no conversation between plaintiff and defendant about other buyers.

Re-examined: Bought more cattle in the district after he knew that the contract was broken. The buying of these other oxen had nothing to do with the breaking of the contract. He bought on the information he received from Hoffman.

By the Court: He kept no note of the transactions which he made with farmers.

Wm. Johannes Hoffman, a cattle buyer in Mr. Louw's employ at Van Rhyn's Dorp, deposed that at the end of July last year he heard that Laubscher had a troop of cattle, which was coming into the market. He wired to Mr. Louw. He thought a good buying price was £7 10s. He could make a profit on that. There were 105 head of cattle. They were divided into two lots of 70 and 35. He counted them and formed an idea of their quality. He had no interest in the transaction save that of a servant. He received a wire from Mr. Louw when the oxen were an hour and a half from Van Rhyn's Dorp. Basson, who was in charge of them, fell sick, and the oxen had to be provided for on the road. They remained ten or twelve days at one place. Laubscher came up on the 6th. Witness conversed with him and Laubscher offered to sell the remainder of the cattle for £7 5s. Witness said the cattle were bad and he could not give more than £5 for the remainder. Laubscher said, "If you don't give me more I'll sell the other oxen as well." Witness told him he could not do that without getting into trouble. Saw Laubscher again. He had seen Combrinck's agent in the interval. Laubscher told witness "he would have nothing more to do with him." Witness should say that they would have made £40 or £50 on the oxen, and that was the amount of damage which plaintiff had sustained.

Cross-examined by Mr. Searle: Mr. Laubscher came to witness three times that afternoon. He did not speak of having received a higher offer for the eighty cattle; he only wanted witness to close a bargain for the twenty. He pressed witness for £7 5s. for the remainder. On the 6th witness knew that defendant had communicated with Vos, the agent for Combrinck & Co. Went with one Oliviera to get hold of the oxen, because he was afraid defendant would dispose of them to Graaff. Witness bought the greater portion of Mr. Louw's cattle.

George Stevens, hotel-keeper, Piquetberg-road Station, deposed that he knew the parties to this suit. Remembered plaintiff coming to his hotel on 2nd August, and in the afternoon saw him and defendant at the bar together. They were speaking about the oxen. Mr. Louw suggested that a wire should be sent to Hoffman to pick out the eighty cattle. Mr. Laubscher said the cattle would have probably left Van Rhyn's Dorp, and he had better allow them to come on to the farm, when he could drive them off.

This closed the case for the plaintiff.

For the defence,

Mathias M. J. Laubscher, defendant, deposed that he lived about an hour from Piquetberg-road. He had dealt in cattle since 1877. Mr. Louw came to his house on the 2nd August, having previously telegraphed that he was coming. Defendant had received a wire from his man Basson, who was with the cattle on the road, to the effect that he was sick and could not come on. Defendant was pressed to sell the oxen but was not anxious. Louw showed witness a telegram from Hoffman, "seventy oxen good, thirty bad." Witness told him he had received more information than he (Louw) possessed. He then offered witness £7 10s a head for seventy, and £7 for ten oxen. Witness told him if in the meantime he got a higher offer he would sell the cattle unless plaintiff offered more. He agreed to that. Witness wanted to see the cattle first, and if the market price was more he must have more, but he would give Louw the preference. It was not the case that the oxen were purchased out and out. He had not seen the oxen since the previous January. Mr. Louw agreed to wire to Van Rhyn's Dorp as to the whereabouts of the cattle, and when the reply came to that wire they were to set out and meet the cattle on the road and see if they could come to a bargain. The telegram came saying that the cattle would be at the station about eleven o'clock. Witness got no reply to the telegram which he sent to Basson. Subsequently he met Mr. Graaff, who gave him a letter to give Mr. Vos. The oxen were two hours from the village. Graaff asked if he could buy the oxen, and witness told him of Louw's offer, whereupon he (Graaff) said he would purchase, and offered £7 15s. for seventy oxen, and for the rest £7. Told Hoffman of this offer made by Graaff. He saw Hoffman three times and spoke to him on this offer, and gave him a chance to offer more, but as he did not witness disposed of the cattle to Graaff. He delivered the oxen to Vos. He told Hoffman to communicate with Louw, he thought Hoffman was the proper man to deal with. On his way home witness met Louw, who asked him why he had sold the oxen. He told him the circumstances—because he had been offered a higher price. Louw said he would summon witness. He (witness) asked him what for. He had kept his word, and he owed him nothing. If Louw had given £7 15s. witness would have sold to him—though he was not bound to do so. His man Basson was very ill, and died shortly afterwards, and witness was anxious to sell the oxen.

Cross-examined: Witness did not communicate with Louw, and did not tell Hoffman what price Graaff had offered. Mr. Graaff wrote a letter to Mr. Vos; witness did not have that letter. Witness told Louw that he might have

eighty oxen at £8 a head. Made Louw three separate offers which were to stand as one. When he had a drink with Louw at the bar of Stevens's hotel he made it clear it was only a provisional sale. Witness expected that the oxen would arrive at the farm, and told Louw that he would inform him when they had arrived.

Re-examined: Louw did not tell witness what he telegraphed to Hoffman.

By the Court: On the 2nd, when Louw left his place he understood that there was only a half sale, and there was nothing binding in it.

Wm. Nicholas Vos, residing at Tulbagh, deposed that he was living at Van Rhyn's Dorp last August. He had power to buy oxen for Combrinck & Co. On 6th August Laubscher came to him. Witness bought seventy oxen at £7 15s. and the remainder at £7. Hoffman had been buying oxen on Mr. Louw's account, and they were running at Van Rhyn's Dorp. Before witness bought the oxen, Mr. Laubscher came three times to him and told him that Louw's people had made no advance.

By the Court: The first time Laubscher came to witness, he asked him if he had sold his oxen, and he said "No." Witness then asked him if he would sell, and he said Mr. Graaff had made an offer, but he would first of all communicate with Louw to see what he would offer.

Mathias Walters, father-in-law of Mr. Hoffman, remembered Mr. Louw coming down to the farm. Was present at the conversation. Louw was anxious to buy the oxen, and Laubscher told him that the price was not sufficient, but he did not hear what the price was.

Cross-examined: He was not there when the price of the oxen was discussed.

Petrus van Ryn deposed that Mr. Vos handed him the piece of paper which contained Mr. Graaff's offer. He gave Mr. Laubscher a draft on Combrinck & Co.

By the Court: There was a good deal of competition at Van Rhyn's Dorp for the purchase of cattle.

Jacobus Graaff, in answer to the Chief Justice, said he met Mr. Laubscher this side of Clanwilliam on the morning of the 5th August. Witness asked him if his oxen were sold. He said no, but there was a provisional agreement with Louw, who had offered him £7 10s. He said whatever witness offered, he must first communicate with Louw's people. Witness offered him £8 a head for fifty oxen, and the remainder for £7, or £7 15s. for seventy and the remainder at £7. He promised not to communicate the terms of the offer to Louw's people, and witness sent the note with the offer to his agent Vos.

This closed the case for the defence.

Mr. Searle was heard for the defendant, and contended that there had been no concluded contract between the parties.

Mr. Schreiner was not called upon.

The Chief Justice said the question was whether on the 2nd August, 1892, the defendant did agree to sell seventy oxen to plaintiff at £7 10s., and ten oxen at £7. He was satisfied from the evidence that plaintiff, at all events, believed that the day before he left defendant's farm there was an out-and-out sale. It was part of defendant's case that plaintiff was anxious to buy; and if he was anxious to buy the oxen, he would have before leaving the farm satisfied himself that he had entered into a final contract for the purchase of the cattle. That he so understood it was clear from his own telegram to his agent at Van Rhyn's Dorp, because at that time this action could not have been anticipated. He immediately forwarded the telegram to his agent that he had bought this number of oxen. He (the Chief Justice) was satisfied that plaintiff firmly believed that there was a *bona fide* sale. But that did not prove the case. If plaintiff had not understood that there was such a sale, defendant would not have been bound. It seemed to his lordship most unlikely that the plaintiff, who was in the habit of purchasing cattle for the purpose of re-selling, would have entered into such a contract as alleged by defendant. The contract was that defendant, before selling to anyone else, was to make over to plaintiff the cattle, mentioning the price at which he could sell. The plea said, "It was arranged between the parties that if defendant obtained a higher offer he would give the plaintiff the opportunity to purchase at the price so offered, and defendant would inform plaintiff whether he was able to obtain a higher price." As regarded that plea, all that need be said was that the contract was not carried out in terms of the plea; the defendant did not inform the plaintiff of the actual price which Graaff was willing to pay, and in terms of the plea he was bound to state the price, and ask plaintiff for an advance. It was clear from Mr. Graaff's evidence that there had not been compliance with the provisional agreement which was relied upon in the plea. But the defence raised in the witness-box was entirely different from that set up in the plea. The defendant's case was that besides the terms incorporated in the plea, there was a further term that the defendant was not bound to sell unless he got full market price, and he said, "Supposing the market price rises to £8 10s, he would not be bound to sell to plaintiff even at the price offered by Graaff." That seemed such an absurd contract that his lordship could not believe that any man in his senses would have entered into it, much less a shrewd man of business like the plaintiff, who although he did not keep books understood his own business, and would not have been a party to such a contract. But not only

were the probabilities in favour of plaintiff, but defendant's own conduct throughout had not been perfectly consistent. In the first place, instructions were given to the legal advisers to draw a plea in a certain form, and when he was in the witness box he gave an entirely different version. His lordship was satisfied that the plaintiff's version was the correct one, and that there was a contract entered into binding on the defendant, and that defendant afterwards, believing that he had been misled as to the true market price of the cattle, resold them. The plea must therefore be dismissed. At the same time, the matter of damages was one which was within the discretion of the Court. The plaintiff ought to suffer for not seeing that contracts of this kind were in proper form. It was a risk to accept oral evidence. Plaintiff had succeeded in the present case, but he might have failed. The Court would not, therefore, go to the extreme limit of damages, but would award 5s. per head of seventy oxen, which would make £17 10s., for which amount judgment would be given with costs.

Their lordships concurred.

[Plaintiff's Attorney, G. Montgomery Walker; Defendants' Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

TRUSTEES OF ASBESTOS COMPANY V. (1893.
HIRSCHE AND OTHERS—HIRSCHE) Feb. 25th,
AND OTHERS V. TRUSTEES OF Mar. 1st
ASBESTOS COMPANY. & 2nd.

Fraud—Illegality—*Ultra vires*—Colourable transaction—Directors of Company—Reserved shares—*Culpa lata*—Winding-up Act, section 47—Damages—Misfeasance or breach of trust.

A fraudulent or knowingly illegal contract entered into by directors of a company for the sale of certain reserved shares of the company cannot be relied upon by them as a justification for delivering such shares to the purchaser at a time when they had risen considerably in price above that at which they were sold.

In estimating the damages sustained by the

shareholders by reason of such delivery no presumption should be allowed in favour of the directors that but for their fraud or illegality the shares would not have risen.

In an action brought by the trustees of a company on behalf of the shareholders against certain directors for their misfeasance in delivering shares then selling at 48s. 6d. each upon payment by the purchaser of only 20s. each, the defendants relied upon a prior contract of sale as a justification for such delivery.

Held, that, inasmuch as the contract of sale as understood by the defendants was illegal, and, as found by the Court, was moreover fraudulent, it afforded no defence to the action, and that the measure of compensation was the difference between the market price of the shares when they were delivered and the price at which they were sold; but, the plaintiffs consenting, the damages were reduced to the amount of profits actually realised by the purchaser.

These were cross appeals from a judgment of the High Court of Griqualand West in an action in which Messrs. Sims and Beveridge, in their capacity as trustees for the Orange River Asbestos and Land Company (Limited) sued the defendants for :

(a) An account.

(b) For the sum of £16,756 9s. 11d., alleged to be due under the following circumstances as disclosed in the declaration, which was as follows :

The plaintiffs are the trustees for the time being of the Orange River Asbestos and Land Company (Limited), a company duly registered with limited liability, and are the proper persons to sue in this action.

2. The defendant King is a speculator, and resides in London; the defendants Hirsche and Weingarten reside in Griqualand West; the defendant Haarhoff is an attorney-at-law, practising in Kimberley and Johannesburg the defendant Voelklein resides in London.

3. The Griqualand West Copper and Mineral Mining Syndicate (Limited) was formed in 1888, and on the 30th November, 1889, the name of the said syndicate was altered into that of the Orange River Asbestos and Land Company (Limited).

4. On or about the 30th November, 1889 at an extraordinary general meeting of the shareholders of the said company, it was duly resolved to amalgamate the said company with a certain syndicate styled the Volharding Copper Syndicate

(Limited), and to increase the capital of the company.

5. The said amalgamation was carried into effect, and under the terms of the same the Orange River Asbestos and Land Company (Limited) took over all the assets, rights, and liabilities of the said syndicate; amongst the assets were a certain farm, named Zeekoebaart, and a sum of £2,918 18s. 6d. in cash.

6. The defendants were the directors of the Griqualand West Copper and Mineral Mining Syndicate (Limited), above referred to, from the date of its formation, 1888, and after the change in the name of the said syndicate into that of the Orange River Asbestos and Land Company (Limited) they continued as directors of the said company until the 5th day of November, 1891.

7. It was the duty of the defendants as such directors as aforesaid under the trust deed of the company to cause true and correct accounts to be kept of all sums of money received and expended by the said company; at least once in every year to cause the accounts of the said company to be examined and audited; to cause a general meeting of the shareholders of the company to be held once in every year, and at such meeting to submit a statement of the income and expenditure of the company to the shareholders, and to conduct the business of the said company with ordinary care and prudence in the interests of the shareholders.

8. The defendants as such directors as aforesaid did not perform any of the aforesaid duties required of them, and which they undertook to perform, in consequence of which neglect the company has sustained loss to the amount of £1,446 9s. 11d.

9. The plaintiffs further say that on or about the 8th day of August, 1889, when the said company carried on business as the Griqualand West Copper and Mineral Mining Syndicate (Limited), the defendants as such directors as aforesaid engaged the services of one Francis Oats to report on the farm Zoetvlei, the property of the said syndicate, for which report the defendants promised to give the said Oats the option of purchasing at par 10,000 reserved shares of the said syndicate of the nominal value of £1 each, such option to expire on the 23rd August, 1889; and further promised that in the event of the said Oats purchasing the said 10,000 shares the defendants would pay him £1,000.

10. The said Oats inspected the said farm Zoetvlei, and reported favourably, but incorrectly, thereon to the defendants on the 19th August, 1889, and on the 23rd August, in pursuance of the aforesaid agreement, the defendants delivered to the said Oats 10,000 shares of the said syndicate, which were then of the value of 48s. 6d. per share, and paid him the sum of £1,000.

11. The aforesaid contract between the

defendants and the said Oats under which the said shares were delivered to the said Oats was wrongful, unlawful and fraudulent, and was made by the defendants not in the interests of the said syndicate, but to induce the said Oats to make a favourable report on the said farm, so that the shares of the said syndicate might rise in value and enable the defendants, who were large shareholders in the said syndicate, to benefit themselves thereby.

12. The plaintiffs submit that the delivery of the said 10,000 shares, the property of the said syndicate, by the defendants to the said Oats was wrongful, unlawful and fraudulent, and that the plaintiff company is entitled to recover from the defendants the difference between the value of the said shares on the 28th August, 1889, to wit, £24,250, and the amount received for them from the said Oats, to wit, £10,000, such difference being £14,250. The plaintiffs further submit that they are also entitled to recover the sum of £1,000 from the defendants.

12A. (Amended by order of the Court)—The plaintiffs further say that under the aforesaid contract the said 10,000 reserved shares were sold by the defendants to the said Oats at a discount of 2s. per share, which the defendants had no power to do, and that the said contract was *ultra vires* the defendants.

13. The plaintiffs further say that at the date of the amalgamation of the said company with the Volharding Copper Syndicate (Limited), to wit, on the 30th November, 1889, one of the assets of the said syndicate taken over by the said company was the said farm Zeekoebaart, situate in Griqualand West, the property of the said syndicate.

14. It was the duty of the defendants, as such directors as aforesaid, to cause transfer to be made forthwith of the said farm from the said syndicate into the name of the trustees of the said company.

15. The defendants neglected their duty on that behalf and transfer of the said farm has not yet been obtained, and by reason of the defendants' delay in causing transfer to be made as aforesaid the company had to pay fines to Government under the Transfer Duty Act and incurred other expenses in connection with the said transfer amounting to the sum of £60.

The plaintiffs pray for :

1. A full and correct account of the administration by the defendants of the affairs of the Orange River Asbestos and Land Company (Limited), of all moneys received by the said company and paid out by the said company, supported by vouchers during the period the said defendants were directors of the said company, to wit, from November 1888 to November 1891, which includes the period when the said company carried on business as the Griqualand West Copper and Mineral Mining Syndicate (Limited).

2. For the sum of £1,446 9s. 11d. referred to in paragraph 8 above.

3. For the sum of £14,250 referred to in paragraph 12 above, and also for the sum of £1,000. (F.J.L.)

4. For the sum of £60 referred to in paragraph 15.

5. General relief.

6. Costs of suit.

The defendants filed separate pleas, but their defence was substantially the same—they denied the authority of the plaintiffs to sue in the present action, on the grounds that the authority to sue was distinctly and directly refused and denied to the plaintiffs at an extraordinary general meeting of the shareholders of the company held on 5th November, 1891.

They denied that the contract with Oats was wrongful, unlawful, or fraudulent, and generally they denied liability. Voelklein was originally joined as a defendant, but the case against him was afterwards withdrawn.

The High Court (the Judge-President and Mr. Justice Solomon) gave judgment against the three defendants Hirsche, King, and Weingarten jointly and severally for £1,000 and costs. Judgment was given in favour of Haarhoff, but he was refused his costs.

Mr. Justice Solomon, in delivering judgment, remarked that if he had been sitting alone he would have given judgment against the three defendants jointly and severally for the sum of £1,000, and for the further sum of £10,875, being the difference between the value of 10,000 shares at 20s. and at 41s. 9d., the latter being the price at which the shares were selling in the market when they were issued to Oats.

Both the plaintiffs and defendants now appealed.

Mr. Schreiner, Q.C. (with him Mr. Searle), now appeared for the original plaintiffs, and was heard in support of the appeal. He contended that the transaction with Oats was fraudulent, and that the directors were liable for the loss which occurred to the company in consequence. He cited the following authorities, which he discussed at considerable length: "Harrington's Case" (8 Q.B.D., 549); "The Crown Reef Case" (High Court, Pretoria), which he distinguished from the present case; "Weston's Case" (10 Ch.Div., 579); "Ex parte Pelly" (21 Ch.Div., 492); "Coventry & Dixon's Case" (14 Ch.Div., 660); "In re Englefield Colliery Co." (8 Ch.Div., 888); "Bryce on *Ultra vires*," p. 624; "Monoreiff on Fraud," p. 488.

Mr. Forster (with him Mr. Juta and Mr. Graham), for the respondents, urged that the charge of fraud which had been practically abandoned in the Court below should not now be relied on. As to the agreement with Oats, it was perfectly *bona fide* and one which the directors were empowered to make under the trust deed of

the company. On the liability and powers of directors and as to what amounted to breach of trust and misfeasance, he referred to the following authorities: "*In re Faure Electric Accumulator Company*" (40 Ch.Div., 141); "*Bentick v. Fenn*" (12 App.Cas., 662); "*Flitcroft's Case*" (21 Ch.Div., 519); "*Leeds Estate, B. & L. Co. v. Shepherd*" (86 Ch.Div., 787); "*Stringer's Case*" (4 Ch., 475); "*Rance's Case*" (6 Ch., 104); "*In re National Funds Assurance Co.*" (10 Ch. Div., 118); "*In re Oxford B. & L. Society*" (85 Ch. Div., 502); "*Ex parte Wilson*" (8 Ch. 48); "*York & N. M. Railway Co. v. Hudson*" (22 L.J. Eq., 529); "*In re Forest of Dean Coal-Mining Co.*" (10 Ch.Div., 460); "*Overend & Gurney's Case*" (5 H. of L., 586).

Mr. Justice Upington referred to "*In re New Mashonaland Exploration Co.*" (3 Ch.Div., 1892).

Continuing his argument (March 1), Mr. Forster maintained that from the facts the Court below could not have found in any other way than they did. The allegations of fraud were two in number. The first allegation practically was that respondents entered into this contract to induce Oats to make a favourable report, and the second that they did so to enable the respondents to benefit themselves at the expense of the shareholders. As to the first allegation, it was admitted on all sides that Oats's report was not favourable, consequently that allegation was swept away. As to the second—that it was made to enable defendants to benefit themselves by a rise in the shares—that was expressly denied by Mr. King. The facts pointing all in one direction, this Court was bound to draw the same inference as the Court below. If their lordships upset the judgment of the Court below on the question of fact, they must either hold that they did not believe the evidence or that the Court below had not exercised its judicial discretion. Counsel then dealt with the report prepared by Mr. Oats, who went out to the farm Zoetvlei to make an inspection for the company.

Mr. Justice Upington: I don't think you can call Mr. Oats an expert in asbestos.

Mr. Forster said the report was not wanted on asbestos. What the company wanted was a report from a well-known engineer of standing to show whether or not asbestos was visible on the farm, and if it would pay to work, having regard to transport and other matters.

Mr. Justice Buchanan: If you ask an engineer to report on a gold mine, what is he supposed to do?

Mr. Forster: To report on the facility for working—not on the quality of the gold. You get a mineralogist to do that.

The Chief Justice: The question is not was the report favourable, but what inducement was held out to Oats to make a favourable report? In

order to ascertain if there was a bribe, we must look at all the surrounding circumstances. If by no possibility can this be considered an honest transaction, is the Court not bound to say it is fraudulent?

Mr. Forster pointed out that every imputation was withdrawn against Mr. Oats in the Court below. He was a member of the "pool"; they wanted him to be in the company with the view of floating the subsidiary companies.

The Chief Justice: The whole evidence shows that there was participation on the part of defendants in making the shares go up. The mere fact that Oats exercised his option made the shares go up.

Mr. Forster maintained that there was nothing to show that the shares went up in consequence of any act on the part of King, Weingarten, or Hirsche. The Court below held that fraud had not been proved. He was perfectly ready to admit that it was a cumbrous way of doing business—giving Oats the option of purchasing 10,000 shares at par in consideration of his services—and that it would have been better to have paid Oats a lump sum for his report, but having elected to do what they did, the question came to be, was it a fraudulent transaction? If the Court looked at the evidence they could not come to that conclusion. It was true there was no immediate necessity for raising £10,000, but it was considered a favourable opportunity of getting rid of a large parcel of shares without risk.

The Chief Justice: There is no risk in selling reserved shares.

Mr. Forster: I mean without affecting the market.

The Chief Justice: What had they to do with the market? The question comes to be, was this transaction for the benefit of the pool or for the benefit of the company?

Mr. Forster: Practically the pool is the company.

The Chief Justice: If you admit that, I think you may give up your case.

Mr. Forster: Your lordship misunderstands me. I say that the majority of the shareholders of the company were in the pool.

The Chief Justice: What is the object of a pool unless it is limited?

Mr. Forster: No. The object of a pool is to have as many people in it as possible. The more the merrier, so to speak, in a pool.

The Chief Justice: The point is that the expert employed exercised his option, which is more eloquent than any report could be.

Mr. Forster urged that unless the plaintiffs could show that there was *malafides* on the part of the directors, that they knew the shares were going up, or that they were actively interesting themselves for other purposes, the Court must

and for the defendants. Counsel went into minute calculations of the profit which Mr. Oats was alleged to have made by the transaction, and contended further that the contract of 8th August must be held to be valid, that it was not fraudulently or unlawfully or wrongfully entered into. If the contract was held to be fraudulent, then he had no case, but there was no suggestion to show that the directors were acting in any other way than as strictly honourable men, and in the interests of the company. It was not shown in any way that they had manipulated the affairs of the company in order to cause the share market to rise, nor that they had put a penny into their pockets by the contract. There might have been an error of judgment, but they could not be held responsible for that. In conclusion, he maintained that whatever view their lordships took with regard to King and Hirsche, they could not hold Weingarten responsible, because he had nothing whatever to do with it. He referred to the "*York & N.M. Railway Co. v. Hudson*" (22 L.J.Eq., 529); "*Overend & Gurney's Case*" (5 H. of L., 486, particularly pp. 493-494); "*Brighton Brewery Company's Case*" (87 L.J.Eq., p. 278); "*New Mashonaland Exploration Company*" (8 Ch.Div., 1892); "*Forest of Dean Coal-mining Company*" (10 Ch.Div., 450); "*Cargill's Case*" (10 Ch.Div., 502); "*Sheffield Building Society*" (44 Ch.Div., 412); "*Land Company v. Lord Fermoy*" (5 Ch., 768), and 63, "*Law Times*," p. 289.

The Chief Justice intimated that the Court would inform counsel to-morrow morning whether it was necessary to hear further argument.

Postea (March 2).

The Court delivered judgment.

The Chief Justice said: We do not wish to hear Mr. Schreiner in reply. The main facts of this case are the following: The Griqualand West Copper and Mineral Mining Syndicate, which for the sake of brevity I shall call the Griqualand Syndicate, was registered as a limited liability company on 5th February, 1889. According to the prospectus issued by the promoters, the first directors were to be Hirsche, King and Weingarten (whom I shall call the defendants) and three others, and the capital was to be £80,000, which was accounted for as follows: The vendors were to receive £15,000 in cash and £45,000 in fully paid-up shares, and 15,000 shares were to be held in reserve for future issue.

The vendors were the three defendants just named and one Symons.

In July, 1889, the directors purchased from another syndicate, of which two of their number, being the defendants Hirsche and Weingarten, were members, the farm Zoetvlei, in the district

of Prieska, for the sake of the asbestos which was supposed to be deposited under the surface in large quantities and of good quality. They had a practical engineer of their own on their mining properties, and the vendors had in the previous year received from competent judges in England reports as to the asbestos sent there, which the latter described as "dismal reports." Three of the directors, Messrs. King, Hirsche, and Voelklein, now entered into communication with Mr. Francis Oats, a mining engineer of considerable repute in Kimberley, with the result that they authorised their secretary to write to Mr. Oats the following letter: "Kimberley, August 8, 1889.—Dear Sir,—I am instructed to inform you that my Board hereby offers you the right of purchasing 10,000 of our reserve shares at par, i.e. for £10,000, for the period of fourteen days from to-morrow, in consideration of which you bind yourself to furnish us with a full and complete report on our farm Zoetvlei, for which report we agree to pay you the sum of £1,000 sterling, in the event of your purchasing the above 10,000 shares at £10,000, it being understood that no fee is to be claimed by you or paid by us should you not purchase the above-mentioned 10,000 shares for £10,000. Awaiting the favour of a reply,—I am, &c., Schumscher, secretary." Oats accepted the offer, and left Kimberley on the 10th of August, accompanied by Hirsche, for the purpose of inspecting the farm. It is not quite clear on what day he returned to Kimberley, but on the 19th he had returned, for on that day he sent in his report from Kimberley. On the 21st a meeting of the directors was held, at which the three defendants and Voelklein were present. At this meeting the purchase of the farm Zoetvlei and the agreement with Oats were approved of, and the secretary laid upon the table Oats's reports and the acceptance of the refusal. Thereupon "it was resolved to authorise the secretary to issue 10,000 of the reserve shares to Mr. F. Oats against his payment of £10,000; also to adopt the report and to pay Mr. Oats the fee of £1,000 as arranged." From the 18th July to the morning of the 8th of August the shares in the syndicate had been gradually rising in the Kimberley share market, with some slight fluctuations, from 5s. to 14s. In the afternoon of the 8th August they stood at 18s. On the 10th they were sold at 19s. 8d. During Oats's absence they rapidly rose to 40s. On the day he handed in his report there were actual sales as high as 45s. On the 21st they were a little lower, being then quoted at 41s. 9d. to 42s. 6d. They reached their highest figure on the 22nd day of August, when they were quoted at 50s. to 51s. On the 28th, being the day on which the shares were issued to Oats, they stood at 48s. 6d., and from that

day they have been gradually falling in price until the present time, when the shares of the Orange River Asbestos and Land Company (which was the name assumed by the Griqualand Syndicate in December, 1889, after its amalgamation with the Volharding Syndicate), are selling at sixpence a piece. During and after the so-called "boom" the defendant King, besides freely speculating in the shares, succeeded in considerably reducing the number standing in his own name. Hirsche's number was so reduced from February, 1889, to February, 1890, by 23,880 shares, King's by 7,026, and Weingarten's by 2,642. All their shares had been "pooled," and King was the manager of the "pool." Before Oats left on his tour of inspection he instructed Mr. Hinrichsen, who then resided at Kimberley and held his general power of attorney, "to do the best for his interest in his absence." There was no means of communication between them, so that whatever Hinrichsen did during Oats's absence was done under the general instructions so given. What was done by Hinrichsen may best be stated in his own language. "The shares," he says, "went up rapidly. I signified to the directors he (Oats) would exercise the option while he was absent—about a week after his departure. I sold most of the shares, these very shares, about this time at 85s. The shares rose from the 8th to say the 16th, and by that time I had sold pretty well half of the 10,000 shares. I sold subsequently about 1,500 more, and the rest I pooled with Mr. King. The 10,000 shares were first made out in the name of Mr. Oats. They might have been, though I do not recollect, subsequently transferred into my name." The witness, however, wholly omitted to state a circumstance which came out subsequently at the trial, that he had an interest to the extent of one-half in Oats's shares. The fact seems to be that all the shares were first issued in the name of Oats, and ceded to Hinrichsen, and that on the same day the registration was cancelled and new shares issued in the name of Hinrichsen. Two of the certificates so issued having been placed in his hands the witness said: "Looking at these two documents, I say that the shares which those documents represent were immediately transferred into my name. I cannot say as to the rest of the 10,000. I did not sell any to Hirsche. Those certificates did pass from hand to hand endorsed in blank. It was unusual to issue new certificates to a transferee. I cannot say why they issued a fresh certificate to me, unless it was the practice of the company. I sold the shares openly in the market. Everyone knew they were Oats's shares." The witness, however, does not say that he told anyone whose shares he was selling. Further on he says: "I should say Mr. Oats made between six and seven thousand pounds profit out of the sale transaction of the shares. This would be including

the £1,000." In his opinion, the shares went up on the strength of such a man as Oats interesting himself in the property." Oats himself did not agree with this view, but ascribed the rise in the shares to "a speculative movement on the part of King," who bought largely at this time. King on the other hand does not agree with either of them, for he says: "I can account for the rise in so far as the discovery of asbestos in large quantities, and supposed at the time to be of very fine quality, caused the public generally to buy these shares very largely, which naturally would cause the rise, besides at the time the share market was active, and there was a good deal of speculation abroad." Hirsche says: "When we returned the shares were about 80s and afterwards rose to about 50s. The public probably thought Oats had reported favourably." He adds, and this is very significant: "I never told anyone what Oats had reported." I shall have to return to this point, but here it is sufficient to say that there is another cause which may have had its due effect, and that is the mere fact that the engineer employed to report upon the property had exercised his option of purchasing ten thousand shares. The report certainly is a very meagre one, as might have been expected from an engineer who admitted in the witness-box that he "had only previously seen specimens of asbestos in museums, not in mines or manufactories." The property did not answer to the expectations held out by the report, and the interest of the directors in the concerns of the syndicate, and of the Asbestos Company with which it was incorporated, became so slight that they rarely met except for the purpose of authorising drafts upon the dwindling capital of the shareholders. In 1891 the shares were almost unsaleable, and the shareholders began to display a desire for more information than had hitherto been imparted to them by the directors. Stormy meetings were held, and a resolution was passed appointing a committee of investigation. In the result the directors were deposed, fresh directors elected, and the trustees were authorised on behalf of the shareholders to institute an action against the former directors in the High Court of Griqualand. The action was brought, and judgment was given against the defendants Hirsche, King, and Weingarten for the sum of £1,000, with costs. The plaintiffs have now appealed against the judgment on the ground that the amount awarded to them is insufficient. The three defendants, on the other hand, have entered a cross appeal on the ground that judgment ought to have been given in their favour. No question has been raised as to the right of the plaintiffs to institute this action on behalf of the general body of shareholders. It is not denied that whatever right liquidators, creditors, or contributories would

have had, in case of a winding-up of the company, under the 47th section of Act 12 of 1868, is vested in the plaintiffs, nor is it contended that the section was meant to deprive shareholders of rights vested in them independently of the Statute. The section provides that where in the course of a winding-up of any company it appears that any director has been guilty of any misfeasance or breach of trust in relation to the company, the Court may on the application of any liquidator, or of any creditor or contributory of the company, examine into the conduct of such director and compel him to contribute such sums to the assets of the company by way of compensation for such misfeasance or breach of trust as the Court may think just. The section is founded upon a similar enactment in the English law, but any questions which may arise in this case as to what constitutes a misfeasance or breach of trust, and what is the legal relation of shareholders of a company towards the directors must be decided according to the principles of our own law. The declaration contains several counts, but the only one with which it is now necessary to deal is that which claims from the defendants the two sums of £14,250 and £1,000. The claim is founded on two grounds, first, that the contract with Oats was *ultra vires*; and, secondly, that the contract was "wrongful, unlawful, and fraudulent." As I understand the reasons of the learned judges in the Court below, they were clearly of opinion that the contract was wrongful, unlawful, and *ultra vires*, but they were not quite satisfied that it was fraudulent. They differed as to the amount of damages to be awarded, the Judge-President being of opinion that damages to the extent of only £1,000 had been proved, and Mr. Justice Solomon holding that in addition to the £1,000, the plaintiffs were entitled to £10,875, being the difference between the par value of the shares and their market price on the 21st of August, 1889. The Judge-President expressed grave doubts as to whether the defendants ought not to be held liable for the additional sum of £10,875, but in the result Mr. Justice Solomon withdrew his own decided opinion, and judgment was entered for the plaintiffs for £1,000. I am bound at once to state that, if the contract of 8th August meant what it said, and was not tainted by fraud, it was, in my opinion, neither unlawful nor *ultra vires*. It was quite competent for the directors to sell 10,000 shares at par to Oats, and to pay him a fee for his report. The giving of an option for a fortnight may be more doubtful, but in view of the large powers conferred on the directors by the articles of association, I have no doubt as to the competency of the directors, if the interests of the company required it, to give a purchaser a fortnight's time to consider whether or not he would take the reserve

shares at par, and in the meantime to bind the company to deliver the shares in case he should exercise his option. Even under the English law, if I read the case of "*In re Faure Electric Company*" (40 Ch.Div., 141) aright, such an arrangement would not be deemed illegal in the sense of being *ultra vires*. If the contract of 8th August honestly intended that the difference between the par value of the shares and the sum for which they were virtually sold to Oats should be the consideration for his "valuable services rendered to the company in furtherance of its objects," then it was clearly protected by the 4th section of Act 13 of 1888, and by sub-section 3, section 106, of the articles of association of this particular company. Strangely enough, neither of these sections seems to have been referred to in the Court below. Upon this part of the case I need only add that before the Act of 1892 contracts by which shares shall be considered as fully paid up where they have been paid partly in cash and partly by means of services rendered, were not required to be registered as appears to be required by the 25th section of the English Act of 1867. Apart from the question of illegality, Mr. Justice Solomon seems to have been of opinion that, although fraud had not been distinctly proved, the defendants were guilty of misfeasance and breach of trust. He says: "A contract such as this was manifestly calculated to bias the mind of the expert in making his report, and it is impossible not to believe that the defendants must have seen what the effect of the contract would be on the mind of Oats." Further on he says that if before the shares were delivered to Oats the shareholders had applied to the Court to restrain the delivery, the Court would have said "that the directors had no right to make such a contract, the tendency of which would be to bias the mind of the expert and to make his duty conflict with his interests." If that is not saying that the contract was a corrupt one it comes very near to it. Perhaps the learned judge may have meant that there was such a degree of *culpa lata*, as according to our writers is *proxima dolo*, or akin to fraud. There certainly may be cases, such as the English case of "*Re Englefield Colliery Co.*" (8 L.R. Ch.D., 888), where directors can be held to have been guilty of misfeasance and breach of trust without fraud, but the present case does not seem to me to be one of them. From the very nature of the transaction, and the circumstances attending it the contract is such that if it implies misfeasance and breach of trust, it was dishonest, and therefore fraudulent. Both the learned judges were agreed that the contract was illegal and in other respects a most improper one, but they hesitated to pronounce it fraudulent. I quite concur with them as to the

strictness of the proof required to establish the plaintiffs' case, but I cannot agree that because there was not sufficient evidence to convict the defendants, if they had been indicted for fraud, therefore the contract cannot be held to have been vitiated by its want of good faith. On a criminal charge of fraud the question would have arisen whether anyone had been actually defrauded. In the present case the only question is whether the defendants can rely upon the contract in justification of their issuing shares to Oats on payment of 20s a share at a time when they were known to be selling at 48s. 6d. It is common cause that they would, under our law, be liable to the company for the difference unless the contract justified the issue of the shares, and that the contract would afford no justification if tainted by fraud or vitiated by illegality. I regret to say that with every desire to place the most favourable construction upon the conduct of the defendants, I cannot bring myself to believe that the transaction with Oats was an honest one. The point of view from which they seem to have regarded their duty was that of holders of and dealers in shares, and not that of directors of the company. I was anxious to discover what necessity there was for raising ten or even nine thousand pounds for the company on the 8th of August, but counsel could only refer us to King's statement in his evidence that the "funds of the company were low, and money was wanted for its operations." But Hirsche in his evidence admits that at that time the company, after purchasing Zoetvel, had £2,000 or £3,000 left, and the minutes of the directors' meetings fully support his admission. These minutes moreover show that in November following, the syndicate had a balance of over £19,000 to its credit with the bank and that in June of the following year the new company still had over £7,000 on fixed deposit in the bank. The mode in which the £9,000 obtained from Oats was expended shows that it could not have been required for the company's operations on the 8th of August. It was certainly not found necessary to sell the remaining 5,000 reserve shares which the company had in hand, when within a fortnight afterwards the shares of the company had risen to 50s. Then again, as to the necessity of paying Oats for his report by giving him an option to buy the shares, the same explanation is offered that the company was short of funds. Oats admits that his valuable services would not have been worth more than £500, and this sum the directors could surely have paid without any serious inroad on the resources of the company. His view of the contract was that the £1,000 in the bargain was merely a colourable transaction to enable him to have the optional shares at 18s., the consideration for the "call" being his report. This also is the

view of some of the defendants themselves. The obvious remark is, if the contract was made in good faith, why should there have been any colourable arrangement at all? Somebody was to be led into the belief that the transaction was something different from what it really was. Upon the admission then of the defendants themselves the object of the device was to mislead those, who should become acquainted with its terms, into the belief that the shares had been bought at *par*, and that £1,000 had been paid to Oats as his fee, whereas according to their view the shares were really bought at 18s. each and £1,000 was paid by Oats as the price of the "call." Such a device would surely fall under the definition of *dolus* as being *machinatio ad fallendum alterum adhibita*. If it be said that there was no fraud because the defendants' sole object was to conceal the illegality of the contract, then surely the contract must be treated as illegal to their knowledge and cannot be relied upon to justify the delivery of the shares on the 28th August, 1889. They knew that what they intended to effect by their contract was illegal, but they must also have known that, if the company was really short of funds, the legal and at the same time, honest course was to remunerate Oats by means of a reasonable number of fully paid-up shares. With a rising market there was no reason whatever for depriving the company of the benefit of the rise in respect of so large a number of shares as 10,000. The defendants must have known that Oats would only exercise his option if he could make a profit by it. But they also knew that the exercise of his option by the trusted expert who had been employed to inspect the property and report on the asbestos, would be a more eloquent testimony to the value of the property than the most glowing report. No wonder then that the first object of the directors was to induce Oats to exercise his option. If he did so he was to get £1,000, if he did not he was to get nothing. Upon this point the cancelled letter of the 8th August furnishes a curious bit of evidence. There the condition reads that "nothing is to be paid by us for such report should the offer not lead to business." This, however, must have been considered too barefaced a way of putting the matter, and the letter actually sent was written. The fact that communications were going on with Oats was not concealed from the public. King says that from the time the negotiations began "till they were concluded there was a constant improvement in the shares, it having become known that there was a possibility of Oats going out to report." And Hirsche says: "As I was seen talking to Oats by brokers and others—the conversation being in the street—the shares rose." If mere talking with Oats in the street had this result, how much more would the exercise of his option effect? The terms of the

contract were withheld from the public and the shareholders, but that would not prevent them from knowing that in fact Oats had been sent to inspect and report, and had, as a result of his inspection, purchased a large parcel of shares. But it would not be convenient that Oats should be known to be a seller. Can it be doubted that it was to prevent this inconvenience that on the very day on which the 10,000 shares were registered in his name his scrip was cancelled, and fresh scrip issued in the name of Hinrichsen? This gentleman admits in his evidence that "those certificates did pass from hand to hand endorsed in blank," and that "it was unusual to issue new certificates to a transferee." I pressed the defendants' counsel for an explanation of the course taken in regard to Oats's shares, and the only answer he gave was that this was a matter between Oats and Hinrichsen with which the defendants had no concern, and that it does not prove fraud on their part. Of course, taken by itself, it does not prove fraud, but it is a circumstance which the Court cannot lose sight of in considering the case in all its bearings. The 23rd of August was the day on which the scrip was issued in Oats's name, countersigned by two of the defendants, Hirsche and Weingarten, and on the very same day Oats's scrip was cancelled and fresh scrip issued in Hinrichsen's name, countersigned by the same defendants. But to return to the contract of 8th August, the inducement to Oats to exercise his option and so influence the share market was not the only objectionable feature of the contract. It also held out the strongest possible inducement to Oats, after having exercised his option, to suit his report to the exigencies of the share market, in which the "pool" controlled by King and shared in by the two other defendants had so direct an interest. It is beside the question to say that the report was an unfavourable one. The report was much more favourable than the result warranted, but let me assume that it was not. Its terms were certainly not made known to the public or even to the general body of shareholders. But before the report was sent in, Oats, through his agent, Hinrichsen, had already disposed of the greater part of his shares at a large profit. His remaining shares also came into the pool under the manipulation of King. So long as the contents of the report remained unknown it now mattered little what it contained. "The public," says Hirsche, "knew that Oats had reported," and nothing seems to have been done to remove the impression on the part of the public that the report was favourable. At all events the share market, in the words of Hirsche, "was brisk in August and September, 1889," and his firm "did a good deal of business." King on being cross-examined as to whether he was one of

the syndicate formed to "boom" the shares asked for a definition of "booming." On being pressed to give his own definition he said, "I understand by booming shares raising the price very, rapidly." He added, "I was one of the syndicate formed for the protection of the market, I will not say to boom the shares absolutely." The fact that Oats had purchased a large number of shares was not concealed from the public and would during the "boom" have its due effect, but the circumstance that he was rapidly disposing of all his shares was effectually concealed. The objection to the contract of 8th August remained that it held out a strong inducement to Oats to exercise his option, and having exercised his option to quicken the share market by a favourable report in case his exercising his option did not have the requisite effect. The fact that the share market did not need further quickening cannot alter the real nature of the original transaction. We have been much pressed with the argument—an argument which had great weight with the Judge-President—that the character of the defendants is such that they cannot possibly have been guilty of attempting to bribe anyone, and that even if their character did not stand so high, the professional standing of Oats was such that any attempt to influence him must, to their knowledge, have been futile. A witness, Mr. Breitmeyer, was called to speak to the character of the defendants, but his evidence loses some of its value by his statement that, so far as he knew, even Schumacher, the defaulting secretary, had a good reputation. I am quite willing to believe that neither Oats nor the defendants would, if they had calmly considered its real nature, have entered into this contract. Unfortunately, the records of this Court of recent years show what ruin may be caused by the conduct of directors standing high in the opinion of their fellow-countrymen. In their eagerness to make money out of the concern and to profit by the speculative excitement which existed, the defendants did not pay sufficient heed to the means adopted for attaining their objects. As directors they occupied a fiduciary position towards the company. Their position was analogous to that which under the Roman law the *institor* held towards his *præpones*. The mandate which they had from the shareholders, quite independently of the terms of any articles of association, was to do their duty faithfully, honestly, and with sole regard to the interests of the company. Bearing in mind the high degree of good faith required by our law (see *Voet* 14. 8. 8) from such a mandatory it might have been fairly contended that independently of the motives which influenced the defendants, their conduct involved such a degree of *culpa lata* as legally amounted to fraud, and rendered them

liable in this action, but I confess that, if recklessness alone could be brought home to the defendants, I should hesitate to call this contract fraudulent. I have therefore given full and careful consideration to all the facts bearing in favour of the defendants, but it has failed to remove from my mind the unfavourable impression produced by the evidence as a whole. In answer to the argument that the employment of an engineer who knew nothing about asbestos to report upon asbestos-mines is an important ingredient upon the question of *bona fides*, it has been suggested by the defendants' counsel that Oats was really employed for the purpose of advising the company upon the advisability of forming subsidiary companies. This, however, is not the view of King, who says that the directors had employed Oats "to examine and report on the quality of the asbestos known to exist on the farm, and the extent of the asbestos there." We have been asked to hold that, because all the defendants in their evidence protested their innocence of any dishonourable conduct, nothing in the nature of a bribe has been proved. But no one who offers an improper inducement to do wrong is ever willing to admit any improper motive. The transaction must, in the nature of things, consist of more than one act, each of which, taken by itself, may be perfectly innocent. It is only by regarding the transaction as a whole, fully considering the effect of all the surrounding circumstances, and carefully scrutinising the real motives of the parties to it, that its true nature can be ascertained. In the present case I am forced to the conclusion that the contract of 8th August was not an honest one. As in all human transactions, the motives which influenced the parties to it may have been of a mixed nature, but the main underlying motive which influenced the defendants was, in my opinion, a wholly improper one. A contract so unusual and misleading in its terms, so unnecessary for the purposes of the company, and attended by so many circumstances indicating want of good faith, must have had ulterior objects in view. Those objects appear to me to have been to induce the company's professional expert to take a large number of shares in the company and thus influence the share market, and, failing such influence, to hold out to him the strongest possible inducement to report in a sense favourable to a rise. It was an ingenious and dishonest contrivance on the part of the defendants King and Hirsche for benefiting themselves and their friends, including Weingarten, who had a share in the pool, at the expense of intending shareholders, with an utter disregard of the interests of the company. As to Weingarten, he was informed of the contract

before the meeting of the 21st August, and fully approved of it, and on the 21st August he was one of the directors who confirmed the previous informal action of his co-directors. He says in his evidence, that at that meeting nothing was said about dividends, and that all he understood was that Oats was to have 10,000 shares at 18s a share. But the resolution actually passed by himself and his co-defendants was, in terms of the previous colourable arrangement, to issue 10,000 shares to Oats for £10,000 and to pay the fee of £1,000. On the 23rd he was one of those who authorised the issue of the scrip, and countersigned the scrip in favour of Oats as well as that issue on the same day in the name of Hinrichsen. His share of the "pool" profits was, according to his own admission, £8,000. I am unable, therefore, to make any difference—as we have been urged to do—between Weingarten's case and that of his co-defendants. In regard to the remark of the defendants' counsel that the plaintiffs' counsel in the Court below had withdrawn the charge of fraudulent motives, I do not so read the arguments in the Court below, a copy of which has been handed in to us. No doubt counsel there said that "he was not going to impeach Mr. Oats," but Mr. Oats was not before the Court, and neither counsel nor the Court had any right to impeach him. As to the defendants, it was distinctly pointed out that they offered a great temptation to Oats by refusing to give him a small interest in the syndicate and insisting upon his taking 10,000 shares. Reliance was chiefly placed upon the negligence and recklessness of the defendants, and upon the illegality of the contract, but the allegation that the contract was fraudulent, so far as the defendants are concerned, was pressed and never withdrawn. The Court having once decided that the contract of 8th August was fraudulent, is relieved from much further discussion of the law by the admissions made by the defendants' counsel. He has candidly stated that if the contract was corrupt or illegal, he could not dispute the contention that the delivery of the shares to Oats on the 23rd August upon his payment of £10,000 was not protected by the contract, and that the measure of compensation may fairly be the difference between the market price of the shares on that day and the price paid by Oats. It is difficult indeed to see how this contention could be disputed. If the contract was dishonest or illegal, the delivery in pursuance thereof could not be honest or legal. *Quod initio vitiosum est, says Paulus, non potest tractu temporis convalescere* (Digest, 50, 17, 29). If a dishonest or illegal bargain does not gain validity by lapse of time, still less can it be relied upon to render valid a transfer or delivery executed in pursuance of such a bargain. The taint which affected the original contract equally affected the

delivery of the shares in terms of the contract. If, therefore, it would have been a gross breach of trust, without any prior contract, to deliver the shares to Oats on the 28rd on the payment by him of 20s., instead of 48s. 6d., he retaining his fee of £1,000, it was an equally gross breach of trust to deliver the shares upon those terms in pursuance of the contract. Under our law considerable latitude is allowed in the estimation of damages where *mala fides* or illegality has been proved. No presumption is allowed in favour of the wrongdoer when once the wrongful intention has been proved. We can therefore admit no presumption that, but for the improper conduct of the defendants, the shares would not have risen to 48s. 6d. on the 28rd of August. Even in the English Courts, where the rules as to the measure of damages are stricter than under the Roman-Dutch law, every presumption seems to be made against a person found guilty of a breach of trust. In "Pearson's Case" (L.R. 5, Ch.Div., p. 836), it was laid down by the Court of Appeal that where a director or other person in a fiduciary position accepts a present from a vendor to the company or *cestui que trust* he is to be charged with and compelled to make good the full possible value of the present or bribe at the time. In the subsequent case of "Weston" (L.R. 10, Ch.Div., p. 579), the Master of the Rolls (Jessel) said: "The Court is not to endeavour to reduce the value." The difference between the market and par value on the 28rd of August was £14,250, but the plaintiffs' counsel, on the suggestion of this Court, have expressed their willingness to accept the sum of £10,875, being the sum for which Mr. Justice Solomon was prepared to give judgment in favour of the plaintiffs, and in regard to which the Judge-President did not express any strong adverse opinion. Mr. Justice Solomon was also in favour of giving judgment for the plaintiffs for the further sum of £1,000, but that would make no allowance for any fee payable to Oats. Upon the whole, therefore, we are of opinion that justice would be done by holding the defendants liable for the sum of £10,875. It would represent as nearly as possible the profit actually realised by Hinrichsen and Oats, if the evidence of the defendants' witnesses be correct that Oats's profits amounted to between five and six thousand pounds. In regard to the plaintiffs' further claim for £1,448 in respect of the loss sustained through the secretary's defalcations, the plaintiffs' counsel said that he would not press it in case his clients obtained a substantial sum ever and above that awarded in the Court below. The result is that the plaintiffs' appeal must be allowed and the defendants' appeal dismissed, and judgment entered for the plaintiffs for the sum of £10,875, with costs.

Mr. Justice Buchanan said: The case has been

so fully stated that I don't think I can profitably add anything to what has been said by my learned brother the Chief Justice. As, however, the issue in this case mainly depends on the question as to whether or not the contract of the 8th August is a valid one, in other words, whether a fraud has or has not been committed, I may state at once that I am clearly of opinion, and I feel bound to say, that the contract was a corrupt one. And this corrupt contract is the only justification which the defendants have been able to set up for parting with the assets of the company at a price very considerably below their real value. The facts of the case are not in dispute, and it is from these facts that we draw our own inferences, and this is just one of those cases in which the Court can draw its own inferences from the facts. It seems to me on the evidence that the contract was in the nature of a bribe, and a bribe not in the interests of the company, but in the interest of defendants themselves. The main difficulty I have had is on the question of damages, but this difficulty has been removed by the action of plaintiffs' counsel, who stated they were willing to accept a substantial sum. I think it might, indeed, have been fairly argued that the value of all the assets which have been handed over under this colourable contract—ought to be recovered from the defendants. Reading the judgments in the Court below, my own opinion agrees more with the argument used in the judgment of Mr. Justice Solomon than in that of his lordship the Judge-President, who appeared to think that it was necessary to prove such fraud on the part of the defendants as would justify their being criminally prosecuted. Yet in effect, in substance, in so many words, he laid down that this was an improper contract which could not justify the defendants in their action. I have only to repeat that I concur with the judgment of the Chief Justice, and will only again express my opinion that the contract was a corrupt one.

Mr Justice Upington: I also concur fully.

Mr. Schreiner: The withdrawal of the claim with regard to £1,448 and the acceptance of substantial damages should not be allowed to tell against us in case the defendants should not abide by the judgment of the Court.

The Chief Justice: That is quite clear.

Mr. Forster: Oh, yes, that is perfectly clear.

[Attorney for the plaintiffs, Gus Trollip; Attorneys for the defendants, Messrs. Fairbridge & Arderne and Messrs. Van Zyl & Buissinné]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 1898.
K.C.M.G. (Chief Justice), Mr. { Feb. 27th.
Justice BUCHANAN, and Mr. {
Justice UPINGTON, K.C.M.G.}]

REGINA V. BLAKE:

Mr. Giddy moved for the removal of the venue in this case from the Supreme Court to the Circuit Court at Prince Albert.
Granted.

WICHURA V. DELBRIDGE. { 1898.
{ Feb. 27th.

Contract—Services rendered—Remuneration
—Action for.

This was an action for £875. The declaration alleged that between December, 1888, and May, 1889, the plaintiff performed certain work for the defendant and rendered him certain professional services in and about obtaining a certain contract for the laying of certain pipes and the execution of certain works for the Cape Town Districts Waterworks Company (Limited).

That the plaintiff was entitled to reasonable remuneration for his services, and it was understood and agreed between the parties at the time that the defendant would pay to plaintiff 2½ per cent. on what ever amount he (the defendant) should receive under such contract as aforesaid as reasonable remuneration for his services in obtaining the said contract for the defendant.

That the amount received by the defendant under the said contract was £85,000, and that £875 was 2½ per cent. on the said sum.

That all things had happened, all conditions had been fulfilled, and all times had elapsed to entitle the plaintiff to be paid the said sum of £875, yet the defendant had refused to pay any part of the said sum, though he had been requested so to do.

The plaintiff claimed the said sum of £875 with costs.

The defendant in his plea denied that any such contract as was alleged in the declaration had been entered into.

The plaintiff appeared in person, and the defendant was represented by Mr. Schreiner, Q.C., and Mr. Watermeyer.

The case was before the Court in 1890, when absolution from the instance was given with costs.

Mr. Watermeyer read the evidence taken in the previous case, after which plaintiff called

Mr. Alfred Macintyre, attorney, deposed that

in December, 1889, he acted for Mr. Wichura. He wrote a letter to Mr. Delbridge, who was a personal friend, asking him when he came to town to call at his office. Witness thought the parties might effect a settlement. Mr. Delbridge came up from Oudtshoorn. He remembered telling him that there was an action pending against him. Witness believed that Mr. Wichura had previously written asking Mr. Delbridge to give him a promissory note for £150. He knew that Delbridge would not sign a promissory note for any one. In conversation Mr. Delbridge did not admit any liability, but he mentioned if he gave plaintiff anything it would be after the contract was completed. He told Mr. Wichura what had passed. Afterwards there was a meeting with defendant's attorney, Mr. Lawton, who recommended that the matter should stand over till Mr. Ohlsson came back from England.

Mr Justice Upington: I should have thought that if Delbridge was under the impression there was no contract he would have said so at once. Witness said Delbridge was not present at the meeting with defendant's attorney.

Cross-examined by Mr. Schreiner: Did you not gather from Mr. Lawton that it would be impossible to go on with the case unless Mr. Ohlsson were here?—A. As far as I remember he said the case could not go on without Mr. Ohlsson's evidence.

J. H. Cosnett, broker, was asked by Mr. Wichura: Do you draw a commission on everything you do as an agent or broker?—A. I try to.—Q. Have you ever had to recover a commission by going to law?—A. Yes.—Q. Would it be reasonable to suppose that if you introduced a contractor who was going to make a pile of money from your introduction, you should receive a percentage?—A. I should expect my commission for introducing business.

William Kemp, contractor, deposed that he had privately paid commission to agents who secured business for him. When tenders were called for he paid nothing, the arrangement was never in writing.

Mr. Henry Tredgold, attorney, deposed that he remembered the conversation with Mr. Lawton, the tendency of which was that the case should be postponed until Mr. Ohlsson came back.

Mr. Ohlsson deposed that he knew Delbridge to be a very good man. Mr. Wichura was the first to speak of Delbridge. Could not say whether he spoke of Delbridge with the view of getting a commission.

Edward Henry East deposed that the contract was finished on the 14th February, 1891, and the total amount paid to Delbridge up to that time was £25,285, and during the ensuing twelve months additional work was done which brought the contract price up to £26,478.

Mr. Wichura entered the box and deposed that Delbridge, when he visited him at his house, agreed to give him the 2½ per cent. He knew perfectly well he was a broker and he (Wichura) introduced himself as on business and not as a private gentleman.

This closed the case for the plaintiff.

For the defence, John Delbridge said he adhered to the evidence he had given in the previous case.

Cross-examined by Mr. Wichura: Plaintiff introduced himself as "the master of the situation." Defendant never promised commission, and never paid a penny away in that manner.

Mr Wichura was heard in support of his own case.

Mr. Schreiner was not called upon.

The Chief Justice said this was really a hopeless action, and his only regret was that in the first instance when the case was tried judgment was not given for the defendant, as in that case the Court would have been spared all this further evidence, which really could not bring the plaintiff's case any further. 'If the plaintiff had proved that in 1898, when he went to defendant's house, he went there in the capacity of a broker or commission agent, and that he had told defendant that he came there in that capacity, and if he had proved, further, that it is the clear custom that under such circumstances the agent would be entitled to a certain commission, possibly he might have succeeded in such a case, but after the evidence that had been led the case was quite hopeless. By the plaintiff's own evidence in the previous case he showed that he did not call upon the defendant as a broker or agent. His evidence was: "That in my mind I thought we had agreed upon 2½ per cent. commission on the first interview on the Sunday. He (the defendant) denies it, so I don't press it. I did not tell him on the Sunday that I was a commission agent." Now, after that evidence had been given, the Court would have been quite justified in giving judgment for the defendant instead of absolution from the instance. Throughout his evidence in chief the impression left on the mind of those who heard it must clearly have been that he introduced Delbridge to Mr. Ohlson without any question arising as to commission. It was not what happened afterwards, but what happened at the time that ought to decide the question. It might well be that afterwards Delbridge gave him some hope that some payment would be made; but that was a mere hope, and could not be enforced in the absence of an agreement. Then Mr. McIntyre had stated what took place between himself and Mr. Delbridge. Assuming everything to be correct as stated by Mr. McIntyre, it did not carry the plaintiff's case one bit further. All Mr. McIntyre

could recollect was that there was some conversation, and that Mr. Delbridge said if he paid anything to plaintiff he would do it after the contract had been completed. That rather supported defendant's case. Defendant maintained that he never at any time came to binding terms. As to the other witnesses, they rather supported the defendant. Mr. Tredgold's evidence did not support the plaintiff in the least. Then they had Mr. Delbridge's evidence. He positively denied the statement by plaintiff that on the Sunday they came to binding terms. To prevent any question hereafter arising, the judgment of the Court would be for the defendant, with costs.

Mr. Justice Buchanan concurred, and remarked that he adhered to the opinion which he expressed in the previous case. Plaintiff had failed to establish a direct or implied contract. One of the strongest points in the case was that when the plaintiff went to the defendant's house he went neither in the capacity of a broker nor a commission agent, and could not be known by public repute as a broker.

Mr. Justice Upington concurred.

[Defendant's Attorneys, Messrs. Fairbridge & Arderne.]

TWYXCROSS AND CO. V. EVANS { 1898.
Feb. 27th.

Shares—Brokerage—Alleged partnership—
Action for sums paid in error.

This was an action for £258 18s. 8d. The declaration alleged that in the year 1898 it was agreed between the firm of Twycross & Co. and the defendant that the latter should pay to the said firm the sum of £2,000 in cash and shares, to be dealt with by the firm in buying and selling shares for and on behalf of the defendant, the firm to receive as consideration thereof the customary and usual brokerage.

That thereupon the defendant paid the sum of £2,900 in cash and shares, and the said firm bought and sold shares for and on behalf of the defendant. That accounts were rendered from time to time, and in March, 1899, the said firm rendered an account to the defendant showing a balance of £852 17s. 6d. in defendant's favour, and paid him the said sum.

The said account was not a final account, and the said firm omitted in error to debit the defendant with certain items. On the 8th of January, 1899, the said firm bought for and on behalf of the defendant 100 shares in the Percy Gold-mining Company for the sum of £250, and paid the said sum and also exchange and stamps, viz., £1 11s. 6d. On the 16th of January, 1899, the said firm sold

300 shares in the Meyer and Charlton Gold-mining Company, the customary and usual brokerage upon which was £20 10s. The said sum of £251 11s. 6d. was in error and by mistake omitted to be debited to the defendant, while the price received by the said firm on selling the said shares, to wit, the sum of £275, was credited to the defendant in the said account. The said firm in error and mistake debited the defendant with £10 10s., instead of £20 10s., in the said account.

After the said account of March was tendered the said firm sold certain shares for the defendant, and received the sum of £42 6s. 8d. therefor, which, less the sum of 8s. 9d., the customary brokerage, is due to the defendant. There are also in the hands of the plaintiffs 100 shares in the Doornkop Gold-mining Company belonging to the defendant. In or about the month of December, 1888, the said firm lent or advanced to the defendant, at his request and instance, the sum of £170.

There is due from the defendant to the plaintiffs the said sums of £170, £251 11s. 6d., £10 less the sum of £41 17s. 6d., i.e., the sums of £170 and £219 14s., but the plaintiffs only claim the sum of £258 18s. 8d., for which sum the plaintiffs issued a writ of arrest against the defendant.

That the defendant refused to pay the said sum of £258 18s. 8d., or any part thereof, although the plaintiffs had tendered, and hereby again tender to the defendant the said 100 shares in the Doornkop Gold-mining Company. The plaintiffs claimed:

(a) The sum of £258 18s. 8d. with interest *ad tempus morae*, the plaintiffs tendering the scrip for the 100 shares in the Doornkop Gold-mining Company.

(b) Alternative relief with costs of suit

Mr. Juta appeared for the plaintiffs.

Mr. Evans, who appeared on his own behalf, stated that he entered into an arrangement with Mr. Geo. Twycross whereby he (Evans) was to supply £1,000 and George Twycross £1,000, so that it was something in the nature of a partnership. Finding that he (defendant) would require to leave Cape Town, he asked Mr. George Twycross for a settlement—that in fact the profits should be divided. Twycross was not quite willing to adopt that course, because, he said, half of the shares and half of the profits were his. Ultimately he agreed to pay half the profits made up to date and half the shares he held in hand as a full settlement. He (defendant) agreed to that. It was agreed that a statement of accounts should be made out by the firm showing how the affairs stood. After waiting a week it was rendered to defendant on the very day he was about to start for Johannesburg. He mentioned to Twycross that it was very awkward for him to check a long statement of accounts in such a short time, but as the profits as brought out appeared to be satis-

factory, he agreed to settle upon the statement and accept it as correct. Mr. George Twycross wrote out the cheque and signed it for the full amount of profits shown on the statement. He also gave defendant half of the shares which were due to him and which had not up to that time been realised. Defendant gave him a cheque for £400 odd, being the half, and the matter was settled. There was a scrip certificate for 100 shares, half of which belonged to defendant and half to Geo. Twycross. It was agreed that Twycross should sell the shares and send half profits to defendant. Thus a complete and final settlement was arrived at, and defendant went off to Johannesburg. He took the precaution to ask his wife to bank the cheque, and to wire to him at Kimberley if it had been paid into the bank. It was paid. Defendant's wife afterwards followed him to Johannesburg. Prior to leaving Cape Town she destroyed various papers and broker's notes, so that defendant had not the data to dispute the accuracy of the account. Some time after, Geo. Twycross—the defendant alleged—got into business difficulties, as he (defendant) did. Correspondence ensued about this debt, and immediately defendant obtained leave of absence from his situation. He came to Cape Town to see Geo. Twycross on the subject under dispute. At first he threatened to take proceedings against him, but afterwards he agreed to come to a compromise. Defendant's estate in the Transvaal had not then been sequestrated. He told Twycross that he could not pay the amount claimed, and even if he could he would not, because he did not think that he (Twycross) was entitled to it.

The Chief Justice: You got £275, but they forgot to debit you with what they had actually paid for the shares.

Defendant admitted that as against the firm of Twycross & Co. he had no defence. But having voluntarily placed himself under the jurisdiction of the Court, having come down from Johannesburg to consult with plaintiff on the matter, plaintiff having agreed to take 10s. in the £, having after all that allowed defendant to go off to Johannesburg, and then having him suddenly arrested at Graham's Town, where he had to find a surety for his presence in this court to-day, he thought the Court would consider these points, at least in the matter of costs.

Mr. Juta, for plaintiffs, admitted that there was a private arrangement between Geo. Twycross and defendant. It was agreed that the name of Geo. Twycross was not to appear in the agreement. The firm knew nothing about it.

After argument,

The Court gave judgment for the plaintiff with costs. The Chief Justice remarked that if the defendant had any action against Twycross for

improper arrest, he could bring his action, but that could not affect the present suit.

Their lordships concurred.

[Plaintiff's Attorney, W. E. Moore.]

KEARNS, ASSIGNEE OF BYDELL { 1898.
AND UYS V. COLE. } Feb. 27th.

Preference — Judicial attachment — *Pignus judiciale* — Pledge — Delivery — Re-delivering — Notarial bond — Judgment creditor and debtor.

Judicial attachment of a judgment debtor's goods confers a preference thereon over a creditor, to whom the goods had been pledged by such debtor, but who, before such attachment, had re-delivered the goods to the debtor, and the fact that the pledge had been effected by means of a duly registered notarial bond does not strengthen the claim of the bondholder as against the judgment creditor's judicial lien.

This was an appeal from a judgment of the Acting Resident Magistrate for Kokstad, in an action in which the present respondent (plaintiff in the Court below) sued the appellant in his capacity as the assignee of the assigned estate of Messrs. Bydell & Uys, of Kokstad, to have set aside the attachment of certain property, taken in execution of a writ of execution upon a judgment of the Resident Magistrate's Court, Kokstad, in a case wherein the present appellant obtained judgment against one Horton for the sum of £41 19s. 1d. and costs. This writ was dated 16th January, 1898, and the messenger attached on the 19th January.

Prior to the issue of this writ on the 22nd December, 1892, Horton, with the knowledge and consent of the defendant's agent Martin and of his other creditors, entered into a general notarial bond, by which amongst other things he hypothecated to Cole the plaintiff certain property therein fully detailed as security for the loan of £200, amongst which property were included all the articles under attachment.

This notarial bond was on the 5th January, 1898, duly registered by the Registrar of Deeds and published for general information. On the same day, the 22nd December, a notarial deed of delivery of the property pledged to Cole was duly executed.

This deed of delivery set forth that Zietaman, the agent of Cole, and thereunto authorised, and at the request of Horton, did proceed to his (Horton's) bakery shop and dwelling-house, and did take delivery on behalf of the said Cole of the

articles enumerated in the annexure to the bond, by first inspecting and examining same, then locking the doors and being placed in possession of the keys thereof for a time sufficiently long to make the said delivery good and valid according to law.

It appeared from the evidence taken at the trial, that Horton being unable to meet his liabilities arranged with his creditors that they should accept 7s. 6d. in the £ cash, and the balance by instalments. It was then arranged that Cole would advance £200 to enable Horton to meet the first instalment. The matter was in this form submitted to the creditors, and they signed letters consenting to the arrangement. Horton then signed a bond in favour of Cole for £200.

The articles under attachment were pledged under the bond, and a notarial deed of delivery executed. Horton admitted in cross-examination that Cole's agent took over his (Horton's) bakehouse and private house, and what they contained, by locking both places up. That he had the key for a few minutes and then returned it to Horton, and that that was the only time he (Cole's agent) was in possession of Horton's premises.

Horton then continued to carry on his trade as a baker, using as such the stock-in-trade and the other articles alleged to have been pledged to Cole.

The Magistrate held that the transaction between Cole and Horton had been *bona fide*, that there had been a valid delivery of Horton's goods to Cole, and gave judgment for the latter, setting aside the attachment by Kearns with costs.

The defendant now appealed.

Mr. Graham was heard in support of the appeal. Mr. Schreiner, Q.C., for the respondent.

The Chief Justice said: The judgment debtor's goods were found in his possession and attached by the messenger in execution of the judgment of the Court. The attachment had the effect of creating a judicial lien on the property as against the debtor himself, and against all creditors not having any real rights in the goods. As long as the goods pledged to Cole were in his possession, he had such a real right as could not be defeated by the subsequent judicial attachment, and he would have had this right even if it had not been fortified by a duly registered notarial bond. But when he redelivered the goods to the debtor he lost his real right therein, and relinquished his right to claim them as against creditors acquiring a subsequent judicial lien upon the goods, and the fact that he held a notarial bond did not strengthen his claim as against such creditors. The Magistrate did not in this case attach sufficient weight to the redelivery of the goods by Cole to the debtor. The judgment creditor was entitled to the benefit of the judicial attachment, and the judgment of the Court must be entered in his favour with costs.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Fairbridge & Arderne; Respondent's Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.] 1898. Feb. 28th.

Ex parte CURREY.

The Attorney-General moved for the admission of Mr. Cyril Curzon Currey as an advocate.

Mr. Currey took the oath, and was formally admitted.

PROVISIONAL ROLL.

COURTENAY V. WILLIAMS.

Mr. Tredgold moved for judgment under rule No. 329 for the sum of £7 bs. 6d. for goods sold and delivered.

Granted.

JAGGER AND CO. V. AMELER.

Mr. Webber moved for judgment under rule 329 for £184 14s. 9d. for goods sold and delivered.

Granted.

REHABILITATIONS.

On motion from the bar, the following insolvents were granted their rehabilitations: J. G. Hugo, Pson, G. H. Kotsé, B. Arnholts, jun., and I. J. Pretorius. In the application of D. J. van Zyl,* leave was granted to apply again in three years, and in the case of W. H. S. Kleyn in twelve months.

THE QUEEN V. ISIDORE HIRSON.

On the application of the Attorney-General, to which Mr. Shiel consented, the argument on the points reserved at the trial was set down for Friday next.

* Vide *ex parte* Van Zyl, Appendix 1.

TRIAL CASES.

CADLEY V. CADLEY. { 1898. Feb. 28th

This was an action for restitution of conjugal rights, failing which for divorce, on the grounds of defendant's malicious desertion.

Mr. Graham, who appeared for plaintiff, asked that in the first instance the rule nisi might be made absolute. Plaintiff was suing by edictal citation, the defendant being in England.

The Court made the rule absolute.

Emma Cadley, plaintiff, was then called and deposed: I reside at Port Elizabeth. I was married to William Charles Cadley on 21st December, 1885, at Prince Albert. There were two children of the marriage, and one is alive—a girl, aged six years. My husband left me in 1888. He went to England, and wrote me three letters, after which he ceased corresponding. I answered all his letters, but he did not reply to my last. Since 1888 he has not contributed towards my support. I wish to have the custody of the child. I do not know where he is living now in England.

By the Court: My husband left me at Port Elizabeth. We had no quarrel. In his letters he said he was going to send for me. He did not always treat me kindly. We parted on good terms. I don't know any of his relatives. I wrote to his sister, but she did not know where he was. They were not on good terms.

Mr. Graham said the certificate of the marriage would be handed in to-morrow, it not having yet arrived from the Resident Magistrate of Prince Albert who had married the parties.

The Court granted a decree of restitution of conjugal rights subject to the production of the marriage certificate, which was handed in on the following day.

[Plaintiff's Attorney, G. Montgomery Walker.]

DE BOT V. DE BOT. { 1898. Feb. 28th.

This was an action for restitution of conjugal rights, failing which for divorce, on the grounds of defendant's malicious desertion.

Mr. Buchanan appeared for the plaintiff.

Marian de Bot, plaintiff, deposed that she was married on 6th November, 1878, and resided after the marriage at the Paarl. Five children were born of the marriage, three of whom were dead. Did not live happily. In 1886 her husband left her and went to Johannesburg. She had received five letters from him. Last week she received another letter from him. It was addressed to her in her maiden name. Her husband had not

supported her since he left. She wanted the custody of her children.

By the Court: Her husband would not work at the Paarl, and his brother-in-law urged him to go to Johannesburg. When they lived together at the Paarl he ill-treated her very much.

The Court granted a decree for restitution of conjugal rights, defendant to return to or receive the plaintiff on or before 15th April, failing which a rule nisi would be granted, returnable on 1st May, calling upon defendant to show cause why a decree of divorce should not be granted.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne.]

SNEIGH V. SNEIGH. { 1892.
Feb. 28th.

Mr. Graham for plaintiff; defendant in person.

This was an action for divorce on the grounds of adultery.

Helen Sneigh, plaintiff, in answer to Mr. Graham, deposed that she was married to defendant on 5th June, 1882. She lived in Cape Town. Her husband ill-treated her. She left him two years after the marriage. There was one child, a boy, who was now ten years old. Her husband had taken up with another woman.

Defendant: So did you with another man.

By the Court: She was a widow before her marriage, and had one child, a girl, who was now in service. After plaintiff left her husband she lived with another man, and had children by him.

The Chief Justice: You cannot get a divorce if you yourself have been guilty of adultery. There can be no order. His lordship recommended that strict inquiry should be made in these cases before bringing them into court.

[Plaintiff's Attorney, J. Hamilton Walker.]

BRIN V. BRIN.

Mr. Graham for plaintiff; defendant in default.

This was an action for divorce on the ground of adultery.

Caroline Brin, plaintiff, in answer to Mr. Graham, deposed that she was married to defendant on the 11th February, 1879, at All Saints' Church, Beaconsfield. They resided at Kimberley seven years, when they came to Cape Town and started the Brooklyn Hotel in Dorpsstreet. Her husband subsequently went to England on a trip, and when he returned plaintiff, with his consent, went to England in January, 1891, and returned in March, 1892. On her return she found a woman named Johanna Donoghue in the hotel. She spoke to her husband about it, and he said he had her there as his wife. Plaintiff occupied the servant's room, and the woman shared her husband's bedroom. Plaintiff was now

managing a public-house. She had a son, a boy of nine years. She had renounced the claim for division of the property, because she knew now that defendant had nothing.

Sarah Hemming, a servant in the Brooklyn Hotel, deposed that she had seen defendant in bed with Donoghue.

The Court granted a decree with costs, and gave plaintiff the custody of the child.

[Plaintiff's Attorney, C. C. Silberbauer.]

KEENAN V. KEENAN.

This was an action for restitution of conjugal rights, failing which for divorce, on the grounds of defendant's malicious desertion.

Mr. Sheil for plaintiff; defendant in default.

Helena Mary Keenan, plaintiff, deposed that she was married on 18th November, 1879. She and her husband lived at Woodstock. The marriage was not a happy one. Her husband ill-treated her. He left her on 20th September last. He was a salesman by trade, but had taken to the stage. He was playing at the Vaudeville at present. In his previous engagements he earned about £4 10s. a week. There was one child of the marriage—a boy—and she wished to have the custody. She last saw defendant on Friday at the Albion Hotel and asked him if he would maintain the child, and he said the Court would decide upon that. He also refused to take her back.

The Court granted a decree for restitution of conjugal rights with costs, defendant to return to or receive the plaintiff, failing which a rule nisi would be granted, calling upon defendant to show cause by the 12th April why a decree of divorce should not be granted and plaintiff declared entitled to the custody of the child, and why defendant should not pay £2 per month until the child should have attained the age of sixteen years.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

GENERAL MOTIONS.

PETITION OF ELIZA TORRET.

Mr. Watermeyer applied for authority to the Registrar of Deeds to pass transfer to Attwell & Co. of certain interests held by petitioner in landed property in Cape Town, she having received full consideration for the same, but being unable to give transfer by reason of her husband's unwillingness to assist her therein.

The Court granted a rule nisi, calling upon respondent to show cause on or before 1st May next why the prayer of the petitioner should not be granted with costs.

CONSISTORY D.R. CHURCH, STEYTL- } 1898.
 LERVILLE V. BOSMAN. } Feb. 28th.

Sale — Pact — Servitude — Registration —
Notice—Prohibition against selling liquor
on land sold—Interdict.

An agreement superadded to a contract of sale of land that the purchaser shall not allow the sale of intoxicating liquors on the land without the permission of the vendor is binding upon the executor of the purchaser.

Where such an agreement has been introduced as a mere pact in favour of the vendor personally it would not be binding upon subsequent bona-fide purchasers without notice even although duly registered; but secus where the agreement constituted a servitude in favour of the vendor as the owner of another tenement, in which case registration would be sufficient notice.

Interdict granted restraining the executrix of the purchaser from selling intoxicating liquors on the land sold without proof of pecuniary damage to the vendor.

Mr. Schreiner, Q.C., moved for an interdict restraining the respondent from further selling, disposing of, or dealing in intoxicating liquors upon the erf No. 18 of block B in Steytleville, as being contrary to the conditions upon which the ground was transferred.

It appeared from the affidavit of the Rev. J. E. T. Welts, minister of the Dutch Reformed Church at Steytleville, and president of the Consistory of the said Church, that on the 22nd December, 1882, the said Consistory caused to be transferred to one J. C. Bosman, of Steytleville, the erf No. 18 of block B of the grounds of the said Consistory at Steytleville pursuant to a sale thereof by them to him.

One of the conditions of sale of the said erf to the said Bosman was that it would not be lawful for any person or persons to sell, dispose of, or deal in intoxicating liquors upon the said ground without the permission of the applicants first obtained, and the transfer in favour of the said Bosman was passed to him subject to the said condition, which with others was attached to and registered with the said transfer.

In 1880 and 1881 Bosman applied to applicants for permission to sell intoxicating liquors on the erf, but the permission was refused.

In 1881 the Licensing Court of Willowmore, notwithstanding a written objection filed on behalf of applicants, granted Bosman a hotel licence with a bar, to sell on the said erf.

Thereafter, from time to time as the licence was renewed, the applicants lodged objections with the Licensing Court against the granting or renewal of the licence, on the grounds that their permission to liquor being sold on the said ground had not been obtained, but without result.

Bosman died in 1889, and subsequent to his death his widow and executrix (the present respondent) obtained from the Licensing Court the licence in her name.

Thereafter the applicants notified to respondent that if she continued to sell liquor without their sanction legal proceedings would be instituted against her. This was early in 1891.

Thereon the respondent applied to the applicants for permission to sell liquor in connection with her hotel, and the applicants, on consideration of the circumstances, agreed to allow her to continue selling liquor for one year, to end on 31st March, 1892.

In March, 1892, the respondent applied for a renewal of her licence without reference to the applicants, to whom she refused to apply for permission to continue trading in liquor on the said ground, stating that she was not going to be bound by the rules of the Kerkeraad, and since the said date she has been selling and is still selling intoxicating liquor upon the said ground, in direct opposition to the wishes of the applicants and the conditions of the transfer of the said erf.

The Consistory now desired to prevent the sale of intoxicating liquor on the said ground, and commenced proceedings accordingly.

The minutes of the applicants expressly stipulate that when permission is granted by the Kerkeraad to any erfholder to sell liquor on his erf such permission does not extend beyond the year for which it is granted, and that if further permission for a fresh period is desired it must be applied for at the time of the application, if any, for a renewal of the licence, and the Kerkeraad maintained that they had the right to refuse or grant further permission, and that this was and is well known to the respondent.

The respondent has applied to the Licensing Court for a renewal of her licence for the year commencing 1st April, 1898.

Mr. Juta appeared for the respondent, and contended that this was not a case for an interdict as the applicants had sustained no injury. They had remained inactive for a number of years and they could not now complain. In any case the respondent should be allowed time to realise her stock, which she could not do if an immediate interdict were granted.

Mr. Schreiner, Q.C., was not called upon.

The Chief Justice said: The late C. J. Bosman purchased the land in question from the applicants upon certain conditions, one of them being that it should not be lawful for any person to sell intoxi-

cating liquors thereon without the permission of the applicants.

The respondent is the executrix of Bosman's estate. She is therefore bound by any pact, or, as the English law would term it, covenant, which would have been binding upon Bosman himself.

The agreement not to sell liquor on the premises would certainly have been binding upon him. It was not improper, illicit, or subversive of the essence of a contract of sale, and therefore, according to Voet (18, 1, 26), could lawfully be superadded as a pact to the sale of the land.

The agreement was duly registered, but as between the vendors and the purchaser or his executrix it would have been equally binding without registration. How far registration would have affected purchasers from Bosman is a question which deserves a few remarks although, in strictness, we are not now called upon to decide it.

Registration of a burthen upon land has sometimes been spoken of as amounting to notice thereof to the world, but this is true in a limited sense only. There are certain known incidents of property and its enjoyment which are recognised by the law. Servitudes, for instance, both predial and urban, are burthens with which land may be affected in favour of persons other than the owner. They are real rights which have been carved out of the full *dominium* of the owner and transferred to others, but they can only be enjoyed by the transferee so long as he is the owner of the dominant tenement in respect of which the right has been created. The registration of such real rights upon the title-deeds of the servient tenement certainly constitutes notice of their existence to all the world. Consequently a purchaser of such servient tenement is bound by the servitude whether he has had express notice of it or not. It does not appear in the present case whether the prohibition against selling liquors on the premises in question was registered as a servitude in favour of other tenements in Steytleville. If it was, I see no reason why it should not be binding upon future owners of the premises without notice of the burthen. If, however, the agreement not to allow the sale of intoxicating liquors was a mere pact made with the applicants as the Consistory of the local church, and not as owners of land in the neighbourhood, then the registration of the agreement would not *per se* bind future owners without actual notice of the prohibition.

The respondent knew of the prohibition during her husband's lifetime. It is true that he took out licences for the sale of liquor in spite of the prohibition, but she is not now entitled to take the benefit of his wrong.

After his death she recognised the applicants' right by applying to them for permission to sell liquors. Such permission was granted for a definite time, that is, till March, 1892. On the

expiration of the period she again applied for a licence to the Licensing Board, but did not obtain the applicants' permission. This she did at her own risk, and she cannot now set up the hardship which she would suffer by being prevented from disposing of the stock of liquors which she had acquired in consequence of her having obtained the last licence. The Court was asked what injury could be done to the applicants by the respondent's canteen. It is true that it may be difficult to estimate the exact pecuniary damage suffered by the applicants, but it is not necessary for the purpose of an interdict that the injury sought to be prevented should be of a pecuniary nature.

A nuisance to one's health, for instance, may not cause any damage in money, and yet it is every day practice to interdict it.

The prohibition was considered of sufficient importance by both parties to the sale to introduce it as part of the contract, and the executrix of the purchaser must therefore be interdicted as prayed, with costs.

Their lordships concurred.

[Applicants' Attorney, G. Montgomery Walker.]

ABRAMS V. ABRAMS. { 1892.
Feb. 28th.

Mr. Shiel moved, on behalf of petitioner, for a rule nisi requiring her husband to show cause why she should not be admitted to sue him *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce.

The Court granted the rule, and made it returnable on 12th April; personal service if possible.

MIDLAND AGENCY COMPANY V. { 1892.
BURGER. { Feb. 28th.

Mr. Buchanan moved for leave to sue by edictal citation in an action about to be instituted against the respondent for the recovery of a sum of money due on a mortgage bond, under hypothecation of a piece of ground in the village of Aberdeen. The respondent was now resident in the Orange Free State.

The Court granted leave to attach the land at Aberdeen to found jurisdiction, and granted leave to sue by edictal citation, returnable on 12th April.

In re ALIWAL NORTH BOARD OF { 1892.
EXECUTORS. { Feb. 28th.

Winding-up Act of 1868, section 47—Companies' Act, 1892, sections 209 and 149—Directors—Breach of trust—Liquidators.

At a meeting of shareholders of a company for the administration of the estates of deceased

persons and other trust estates it was resolved that the company be voluntarily wound up, and two of the directors were appointed liquidators.

A shareholder, who was not represented at the meeting, now applied for a compulsory winding-up on the ground that the two liquidators had, with the other directors, been guilty of a breach of trust in speculating in gold-mining shares with the assets of the company and would not be fit and proper persons to thoroughly investigate the affairs of the company.

Held, that, inasmuch as the trust deed did not authorise the directors to speculate in gold shares, and the liquidators had not satisfied the Court that they voted in the minority when the speculations were entered into, the order for a compulsory winding-up ought to be made in order that independent liquidators might be appointed by the Court.

This was an application to place the company under the operation of the Winding-up Act of 1868.

On the 5th July, 1892, it was resolved at a meeting of shareholders to voluntarily wind up the company, and two of the directors were appointed liquidators.

The matter was before the Court on the 24th January last, when it appeared from the affidavits that the accounts showed that the funds of the company had been used for speculative purposes as far back as the month of August, 1886, and that large sums of money had been invested in the purchase of gold shares, and,

That the present liquidators were directors of the company during part of the time when these speculative transactions were undertaken.

The Court on the 24th January ordered the matter to stand over for further information from the liquidators as to whether they had opposed the policy of purchasing gold shares.

Mr. Molteno, for a shareholder who was not represented at the meeting of the 5th July, now moved that the company be placed under the operation of the Winding-up Act, on the ground that the present liquidators were not fit and proper persons to inquire into the affairs of the company, as they were directors when the speculation in gold shares was entered into, and because they had been guilty of a breach of trust.

[Under the trust deed no power was given the directors to use the assets of the company for speculative purposes.]

Mr. Searle appeared for the liquidators, and read their affidavit, in which they stated *inter alia* that they were both opposed to, and did, as members of the Board of Directors, oppose the transactions and dealings in gold shares.

That it appeared from the books of the company that the first transaction in gold shares took place in 1886, and that the losses in gold share transactions entered into during the period that the company was under the management of a Board of Directors amounted to the sum of £400.

Mr. Searle contended that it was unnecessary that the Board should be placed under the operation of the Winding-up Act, and that voluntary liquidation would save much unnecessary expense which would be occasioned by a compulsory winding up, by which no benefit would accrue to the general body of shareholders.

The Chief Justice said: It would certainly be a monstrous state of the law if the directors of a company formed for the purpose of administering the estates of deceased persons and other trust estates could, without any special authority to that effect conferred upon them by the trust deed, use the company's assets for the purpose of speculating in gold-mining shares. It is not surprising that it was found necessary to wind up this company. It was a voluntary liquidation, and two of the directors were appointed liquidators by a meeting of shareholders.

A non-consenting shareholder now applies for a compulsory winding-up, in order that other liquidators may be appointed by the Court.

When the matter was last mentioned the Court considered it fair that the two directors who had been appointed liquidators should have an opportunity of satisfying the Court that they were not responsible for the illegal conduct of the Board of Directors. The only statement they now make is that they were opposed to the transactions in gold shares. This is by no means a satisfactory statement. They are the custodians of the company's books, and if they really opposed the speculations, the minute-book ought to show that they voted in the minority. We have been urged not to disturb the existing liquidation because considerable expense has already been incurred, and no good could result from a compulsory winding-up. But the 47th section of the Winding-up Act of 1868, and now the 209th section of the Companies' Act of 1892, confer powers on official liquidators which it were well that they oftener exercised.

An investigation such as is there authorised is not likely to be instituted by directors whose own acts would be the subject of such investigation.

The Court will order the company to be wound up, and appoint Mr. Schweitzer as official liquidator with the powers mentioned in the 149th section of the Companies' Act, 1892, upon his

giving security to the satisfaction of the Resident Magistrate of Aliwal North for £2,000.

The costs of this application to come out of the assets of the company.

Their lordships concurred.

[Attorneys for the applicant, Messrs. Fairbridge & Arderne; Attorneys for the Company, Messrs. Reid & Nephew.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

HAUPT V. KORSTEN. { 1898.
Mar. 2nd.

Provisional sentence — Mortgage bond — Documentary evidence.

To a claim for provisional sentence on the balance of a mortgage bond the defendant objected that the plaintiff was not entitled to recover such balance until the defendant had received transfer of a piece of land alleged to have been purchased by him in addition to the land transferred and mortgaged.

The declarations of purchaser and seller, and the deed of transfer, stated that £200 was the price of the land actually transferred and did not mention the additional piece of land.

Held, that the defendant's unsupported allegation that such additional land had been purchased should not outweigh the documentary evidence, and that provisional sentence should be granted.

Mr. Joubert moved for provisional sentence for £75, the balance due on a mortgage bond originally passed for the sum of £150.

Mr. Juta appeared for the defendant, and read his affidavit, from which it appeared, *inter alia*, that on 28th January, 1890, he purchased from the plaintiff for the sum of £200 certain land, to wit, the lots 8 and 9, in extent twenty morgen, situate on the Wynberg Flats, together with certain three morgen of ground known as lot No. 8 Extension, also situate on the Wynberg Flats.

That the parties mutually agreed to the following terms of settlement:

(a) That defendant should pay £50 cash.

(b) Pass a bond (kusting) for £150 mortgaging the said lots 8 and 9.

(c) That plaintiff should thereafter pass transfer to defendant of the said three morgen of land.

That defendant had duly completed his part of the said agreement.

That on 18th March, 1890, plaintiff's attorney confirmed the liability of his client in respect of the said three morgen of land, as per his letter dated 18th March, 1890.

But that up to the present defendant had not received transfer of the said ground to which he was entitled.

And that he was still ready and willing to pay the moneys demanded of him, upon delivery of title to the said ground in terms of the agreement of purchase of 28th January, 1890.

The plaintiff's attorney, in his answering affidavit, alleged that plaintiff had promised to give transfer of the ground as soon as he could obtain transfer from the Government. That the three morgen in question had been leased by Government to one Ebel under Act 10 of 1877 on the 8th April, 1886.

That by the terms of the said lease Ebel was not entitled to dispose of the said lease, or of a quitrent grant obtained under a preceding condition, before the expiration of five years from the date of obtaining the said lease.

That the plaintiff had up to the present been unable to obtain transfer of the said three morgen, and could not therefore pass transfer to the defendant.

That plaintiff was informed that Ebel was dead, but as no death notice had been filed with the Master there was no executor representing Ebel's estate.

That the Secretary of Lands, Mines, and Agriculture had been communicated with on the subject, and that the Secretary in his reply had informed plaintiff that the sanction of Government to the proposed transfer would have no effect in the absence of the consent of the late registered holder or his legal representatives, and that if they could not be found, application should be made to the Supreme Court.

Mr. Joubert, for the plaintiff, contended that the defendant could not go behind the bond which stated the consideration and the contract. He cited "*Keyter v. Viljoen*" (1 Menz. 44).

Mr. Juta was heard for the defendant.

The Chief Justice said: In the conflict of testimony between the parties it is well that we should attach every weight to the unimpeachable evidence afforded by the documents.

The deed of transfer mentions £300 as the price of the property bought from the plaintiff, and transferred to the defendant.

The sum of £50 was paid in cash, and a mortgage bond passed for £150. Subsequently the defendant paid off £75, but he refuses to pay the balance of £75 on the ground that he has not obtained transfer of another piece of land which,

be alleged, was included in the purchase for £200.

There is no evidence that this land was so included beyond the defendant's statement, which is denied by the plaintiff. The declaration of the purchaser and seller have not been produced, but it is admitted that they would state the same consideration as appears on the transfer deed.

The plaintiff's delay in suing on the bond, and his endeavour to obtain additional land for the defendant from the Government, have been sufficiently explained, and even if unexplained, would not be sufficient to destroy the *prima-facie* case afforded in the plaintiff's favour by the documents. Provisional sentence must be granted with costs.

Their lordships concurred.

[Plaintiff's Attorney, C. W. Herold; Defendant's Attorney, Gas Trollop.]

HOSKING V. HOSKING. { 1898.
Mar. 2nd.

Mr. Graham moved to make absolute the rule nisi for dissolution of the marriage subsisting between the parties by reason of respondents' failure to obey the order for restitution to his wife of her conjugal rights, and giving the custody of the child of the marriage to the mother.

The Court made the rule absolute with costs.

IRVINE V. IRVINE.

Mr. Maskew, on behalf of petitioner, moved for a rule nisi requiring her husband to show cause why she shall not be admitted to sue him *in forma pauperis* in an action for a decree of separation by reason of his alleged misconduct.

The Court granted the prayer of the petition, and made the rule returnable on March 18.

HAYTER V. SCOTT BROS.

Mr. Graham moved on behalf of petitioner for leave to sue *in forma pauperis* in an action for the recovery of damages from Adolphus Scott, trading as Scott Bros., for wrongful dismissal from his employment as manager and cutter in the business.

The Court made the order, Mr. Graham to take the reference.

PETITION OF ABRAHAM U. DUVENAGE AND
ANOTHER.

Mr. Maskew moved to make absolute the rule nisi issued under the Titles Registration and Deregulation Lands Act, for the transfer to petitioners of certain share of the perpetual quit-rent place Rietpoort, in the division of Colesberg.

Granted.

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BARENNA V. BARENNA.

Mr. Graham moved to make absolute the rule nisi for the dissolution of the marriage subsisting between the parties, by reason of the respondent's failure to obey the order for restitution to his wife of her conjugal rights, and giving the custody of the minor children of the marriage to the mother.

The Court made the rule absolute.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

LIQUIDATORS OF UNION BANK V. { 1898.
KING'S TRUSTEE. { Mar. 8rd.

Winding-up—Insolvency—Call—Proof of debt—Contributory—Account and plan of distribution—Surplus—Confirmation of account—Discharge of insolvent—Personal liability of trustee.

The liquidators of a company wound up under the Winding-up Act of 1868 may place upon the list of contributories the name of a trustee of an insolvent shareholder, and a call duly ordered upon such contributory amounts to a judgment which may be proved against the insolvent estate.

The insolvent is not entitled to receive any surplus awarded to him by the plan of distribution until he has received his discharge, and in the meantime it is competent for the creditors to prove their claims subject to the provisions of the 37th section of the Insolvent Ordinance.

An account and plan of distribution awarding such surplus to the insolvent having been confirmed by the Court, and no proof of debt having been filed by the liquidators, the trustee in good faith and in the belief that the company, which had not then been ordered to be wound up, was a sound concern, paid a portion of such a surplus to the insolvent.

Held, that the trustee was not personally liable, at the suit of the liquidators, to refund the amount so paid.

Distinction between trustees and executors not providing for any continuing liability of estates respectively administered by them explained.

This matter, which was partly disposed of yesterday, came on for further hearing.

Mr. Schreiner, Q.C., moved for an order amending the list of contributories by substituting the name of Wm. F. Stamper as trustee of the insolvent estate of the said King for that of the said King individually, and declaring him liable in such capacity for all calls due on the forty shares in the said bank belonging to the estate, and further declaring him liable *de bonis propriis* in respect of such calls for all assets in excess of the claims proved in the said estate, and for the costs of this application.

It appeared from the petition of the liquidators that the estate of the said King was sequestrated as insolvent on or about the 15th November, 1887, and that since that date he had not received his discharge.

That Mr. W. F. Stamper was the duly appointed trustee to the said insolvent estate.

That on or about the 5th November, 1889, a second and final account in the said insolvent estate was confirmed by the Court, and that this account showed that all creditors who had proved claims were awarded in full and that the following assets remained to be returned to the said King: £128 6s. 2d. in cash, forty shares in the Union Bank, claims against H. J. Kuhn and G. King, also a life interest of his wife Mary Jane King, to whom he is married in community of property, in the estate of the late Thomas Muter under the administration of the South African Association.

That since the date of the confirmation of the account King had received £41 18s. 6d., leaving a cash balance in the hands of the South African Association of £86 6s. 8d., which was the amount not paid over at the time of the stoppage of the Union Bank, and which was deposited through that institution with the Union Bank to the credit of the said insolvent estate when the Union Bank stopped.

That as the said King had not received his discharge after the confirmation of his account the said moneys were still in the hands of his trustee.

That the forty Union Bank shares referred to above were at the date of the stoppage of the Union Bank, and still are, registered in the name of the said King.

The liquidators prayed that the Court might grant them an order:

(a) Amending the aforesaid list of contributories by substituting the name of William Frederick Stamper, in his capacity as trustee in

the insolvent estate of the said King, instead of the said King.

(b) Declaring the said Stamper liable in his capacity for all calls already made by the Union Bank.

(c) Adjudging that the said William Frederick Stamper should pay *de bonis propriis* the calls aforesaid, to the extent of the value of such funds and assets as were referred to in the petition, and any other assets of the insolvent estate which might be vested in him as trustee, and that he should pay the costs of this application.

The trustee, in his answering affidavit, alleged *inter alia* that the liquidation and distribution account, referred to in the petition, clearly set forth that the surplus of assets, after payment of all creditors in full who had filled claims, was awarded to the insolvent.

That no claim had been proved by the said bank, which, at the time of the confirmation of the account, would appear to have been in a flourishing condition, seeing that a dividend of £20 was paid on the said shares in January, 1889, and duly accounted for in the liquidation and distribution account.

That the amount of cash awarded to the insolvent was £128 6s. 2d., and was on deposit in the said bank to the credit of the said estate; of this a sum of £41 was paid to the insolvent, but the balance was not paid to him owing to his refusing to grant a receipt therefor, and it remained on deposit in the said bank to the credit of the estate, and was in the hands of the said bank when it was placed under the Winding-up Act in the month of July, 1890.

That the applicants had from time to time paid out dividends on the amount so deposited, and there was now a sum of £84 10s. 8d. lying in the Standard Bank to the credit of the said estate.

That the remaining assets not realised, consisting of the said shares and certain claims against debtors of the said insolvent, as also a certain *fidei commissary* inheritance, the life usufruct whereof is now enjoyed by the insolvent's wife, to whom he is married in community of property, were at present in the possession of the South African Association, of which institution the trustee was secretary when elected trustee of the said estate.

That the said sum of £84 10s. 8d. and the other assets of the estate were available for distribution in any manner that the Court might direct.

After the stoppage of the Union Bank an application on behalf of the liquidators was made to a judge in chambers for a fresh order for the sequestration of King's estate.

This order was refused, the learned judge being of opinion that the Union Bank shares were vested in King's trustee.

Mr. Schreiner, Q.C., was now heard in support of the application, and contended that nothing but the insolvent's discharge could entitle his trustee to pay him any part of the balance of his estate. As to the vesting of the estate in the trustee, he referred to the 49th section of the Insolvent Ordinance, and urged that there could be no re-vesting in the insolvent until he had been discharged, otherwise the 87th section would be inoperative—sections 120 and 121 must be read together. He cited *Liquidators of Union Bank v. Watson's Executors* (8 Juta, 800) and *Henning's Executor v. The Master* (8 Juta, 285).

Mr. Juta was heard for the trustee, and relied on the 121st section.

Mr. Schreiner, Q.C., replied.

The Chief Justice said: The first prayer of the liquidators' petition asks for an amendment of the list of contributories by substituting the name of the respondent, as trustee of King's insolvent estate, for that of the insolvent. The amendment must, in my opinion, be made, for the Winding-up Act of 1868 recognises the distinction between persons who are contributories in their own right and persons who are contributories in a representative capacity. The placing of the trustee on the list would not dispense with the necessity of a formal proof for the calls upon the insolvent estate, but it would, without the expense of a lawsuit, amount to a judgment which may be proved. It follows that the second prayer also should be granted, which asks for an order declaring the respondent, in his capacity as trustee, liable for all calls duly ordered in respect of the insolvent's shares in the Union Bank.

There is more difficulty in regard to the third prayer that the respondent should be declared *liable de bonis propriis* "in respect of such calls for all assets in excess of the claims proved in the estate and for the costs of this application."

It appears that the respondent has filed a liquidation account in the insolvent estate shewing a surplus after payment of all claims then proved, and awarding such surplus to the insolvent.

After the confirmation of this account, but before the discharge of the insolvent, the trustee paid to the insolvent a portion of the surplus, and was only prevented from paying over the whole surplus by the insolvent's refusal to grant a receipt in full. The trustee is now prepared to pay the balance to the applicants, as the only remaining creditors of the estate, but he refuses to refund the amount which he has in good faith paid to the insolvent. In support of the contention that the respondent is liable for this amount, the applicants reply upon the cases of "*Henning's Executor v. The Master*" (5 Juta, 285) and "*Liquidators of Union Bank v. Watson's Executors*" (8 Juta, 300).

In the former case, however, the question as to

the Master's liability to refund money paid to the wrong person arose at the suit of the person to whom the money was directly payable.

The assets of a deceased person had been handed over by the Master to a person not duly appointed as executor, and the Court held that the Master was bound, when the true executor appointed by himself claimed those assets, to refund them to him.

In the present case the applicants have their claim against the estate not as owners of the assets, but as creditors entitled to prove their debt. The second case relied upon was one in which the executors of a deceased shareholder in the Union Bank were held liable for distributing the assets of the estate among the heirs with full knowledge that the shares still stood registered in the name of the estate.

The Court there pointed out that an executor is bound to pay all debts and claims of the existence of which he has knowledge, whereas a trustee is bound only to pay such claims as have been duly proved.

Reliance was also there placed on the exceptional position of an executor as taking the place of the heir under the old Dutch law, who had adiated with benefit of inventory. Such an heir was liable to the creditors if he paid out legacies without providing for those liabilities of the estate of which he had knowledge. Another distinction is that there exists no legal provision for the confirmation of an executor's account by the Court as there is in regard to trustees' accounts.

In the present case the plan of distribution was duly confirmed, and thereafter a portion of the surplus awarded to the insolvent by such plan was paid to him in good faith, and in the belief that the bank, which had not yet been ordered to be wound up, was a sound concern.

The respondent ought not, therefore, to be held liable for such payment. As to the balance still in the respondent's hands, it forms part of the insolvent estate, and cannot be claimed by the insolvent until after his discharge. In the meantime the applicants can prove their claim, subject to the provisions of the 87th section of the Insolvent Ordinance. It is true that, under the 121st section, the insolvent is entitled to the residue of the estate, but only "after the payment of all claims thereupon."

The award of the surplus to the insolvent is not conclusive in his favour so long as it is competent for creditors to prove their debts and to claim an amendment of the plan of distribution. There seems to be no creditors of the estate besides the applicants, so that the practical result of our decision will be the payment of the balance in the respondent's hands to the applicants.

Whether the money paid to the insolvent can be recovered from him is not a question which now arises.

The costs of this application must be paid out of his estate.

Their lordships concurred.

[Attorneys for the Bank, Messrs. Fairbridge & Arderne; Attorneys for the Respondent, Messrs. Wessels & Standen.]

REGINA V. HIRSCH. { 1898.
Mar. 8rd
& 6th.

Criminal libel—Act 48 of 1882—Innuendo—
Exceptions—Special plea of justification—
Public interest—Time and manner of
publication.

Where, in a criminal prosecution for libel, the words alleged in the indictment to have been used by the defendant are capable of the meaning ascribed to them in the innuendo an exception to the indictment on the ground that the innuendo was not justified by the words used held to be bad.

The alleged libel having been published by means of postcards addressed to the person libelled and read by members of his family,

Held, that a special plea of justification should state the fact or facts by reason of which it was for the public benefit that the matters charged should have been published in that particular manner, and that in the absence of such a statement, an exception to the plea was properly allowed, and evidence in support of the plea properly disallowed, at the trial.

Held further, that if the plea had not been open to the exception it would have been the duty of the presiding judge to leave to the jury the question whether the time and manner of publication were such as to serve the public interest.

This case came on for argument on certain points reserved for the consideration of the Supreme Court at the trial of the accused at the last Criminal Sessions.

The accused was charged on the following indictment:

That Isidore Hirsch, a farmer, residing at Muizenberg, in the district of Simon's Town, is guilty of the crime of publishing a defamatory libel:

First,—In that upon or about the seventeenth day of October, in the year of Our Lord One Thousand Eight Hundred and Ninety-two, at Muizenberg aforesaid, and at a time when one

James Gill was a schoolmaster, residing at Muizenberg aforesaid, the said Isidore Hirsch wrongfully, unlawfully, and maliciously contriving and intending to injure the said James Gill in his good name, credit, and reputation, and to bring him into public contempt, infamy and disgrace, did, upon or about the said day, and at Muizenberg aforesaid, wrongfully, unlawfully, and maliciously write and publish, or cause and procure to be written and published, of and concerning the said James Gill, to wit on a post-card, posted in the post-office at Muizenberg, and addressed to the said James Gill at Muizenberg, where it was duly delivered through the post-office, the false, scandalous, malicious, and defamatory words following, that is to say:

To James Gill.

Muizenberg, October 17, '92.

You have been selling ground which does not belong to you, James Gill, and you are offering ground for £10, and you can give no transfer, James Gill, you better drop this little game, James Gill, take my tip.

I. HIRSCH.

He, the said Isidore Hirsch, meaning thereby that the said James Gill was a person of dishonest character, and had been fraudulently disposing of and offering for sale property of which he was not the lawful owner, and of which he could give no transfer.

Secondly,—As also, in that upon or about the thirty-first day of the said month, at Muizenberg aforesaid, and at a time when the said James Gill was such schoolmaster as aforesaid, the said Isidore Hirsch wrongfully, unlawfully, and maliciously contriving and intending to injure the said James Gill in his good name, credit, and reputation, and to bring him into public contempt, infamy, and disgrace, did, upon or about the day last aforesaid, and at Muizenberg aforesaid, wrongfully, unlawfully, and maliciously write and publish, or cause and procure to be written and published, of and concerning the said James Gill, to wit on a post-card, posted in the post-office at Muizenberg, and addressed to the said James Gill at Muizenberg, where it was duly delivered through the post-office, the false, scandalous, malicious, and defamatory words following, that is to say:

Your own surveyor informed me that he told you over and over again that you have no ground this side of the main road, but still you keep on tantalising and spoiling sales of land and houses. James Gill, you are playing a dangerous game; return the £10 at once to Mr. H. Moubray, or I see the Crown Prosecutor.

I. HIRSCH.

He, the said Isidore Hirsch, meaning thereby that the said James Gill, though well knowing that he

had no legal claim to any ground on a certain side of the main road at Muizenberg, persisted in falsely and fraudulently asserting his claim to such ground, and that he was acting fraudulently and criminally by retaining in his possession a certain sum of money, which was not his lawful property, and was a person of dishonest character.

Thirdly,—As also, in that, upon or about the first day of November in the said year, at Muizenberg aforesaid, and at a time when the said James Gill was such schoolmaster as aforesaid, the said Isidore Hirsch wrongfully, unlawfully, and maliciously contriving and intending to injure the said James Gill in his good name, credit, and reputation, and to bring him into public contempt, infamy, and disgrace, did, upon or about the last day aforesaid, and at Muizenberg aforesaid, wrongfully, unlawfully, and maliciously write and publish, or cause and procure to be written and published, of and concerning the said James Gill, to wit on a post-card, posted in the Post-office at Muizenberg and addressed to the said James Gill at Muizenberg, where it was duly delivered through the post-office, the false, scandalous, malicious, and defamatory words following, that is to say:

As you make it a practice of writing to ladies, or going to their houses, when the husband is not there, I wish you would make a call when a husband is at home, I am sure you get something.

I. HIRSCH.

He, the said Isidore Hirsch, meaning thereby that the said James Gill was a person of cowardly and disreputable character, who made it a practice of calling upon and intimidating married women to serve his own purposes, and in the absence of their husbands.

The prisoner at the trial excepted to the third count of the above indictment, on the grounds that the innuendo, deduced from the words used in the post-card in the said count contained, was not justified by the language of the said post-card, and that a fair and reasonable construction had not been put upon it by the Crown. This exception was overruled. The prisoner then handed in the following plea:

For a plea to the indictment, by which he (the defendant) is charged with the crime of publishing a defamatory libel of and concerning James Gill, a schoolmaster, residing at Muizenberg, the said defendant says that the matters charged in the alleged libel are true; and that our Lady the Queen ought not further to prosecute the said indictment against him by reason of the matters following:

1. That the defendant is not guilty.

2. That he was justified in writing and publishing the post-cards referred to in the indictment,

and that it was for the public benefit that such matters were published in the manner in which and at the time when they were published.

3. As to the post-card in the third count of the indictment referred to, defendant says that the allegations in the said post-card are true, and that the said James Gill has on divers occasions written letters to married ladies threatening lawsuits, and has also visited ladies during the absence of their husbands, and during such visits has caused annoyance and alarm to the ladies referred to, and that the terms of the said post-card were intended as a warning to the said James Gill, and were written without malice, and had for their object a prevention of a breach of the peace.

4. With regard to the post-card dated Muizenberg, October 17, 1892, and signed I. Hirsch, defendant says that the said James Gill sold to one Edward John Hare, on or about the 12th day of December, 1891, a piece of ground which was not registered in the said James Gill's name, and to which the said James Gill had no right or title. And defendant further says that the said James Gill offered during the month of August, 1892, to sell a piece of ground which was not registered in his (the said James Gill's) name to one Mary Chapman for the sum of £10 sterling.

5. With regard to the postcard dated 31st October, 1892, and signed I. Hirsch, defendant says that the statements therein contained are true, and that by reason of the said James Gill making or laying unjust claims to land to which he was not entitled, and of which he was not the registered owner, he did spoil and prevent the sale of land and houses in Muizenberg.

6. Defendant finally says that it is for the public benefit that the matters in this plea set forth should be made known and published as aforesaid, inasmuch as it is to the public interest that the purchase and sale of land and houses at Muizenberg should not be interfered with by means of unjust claims made in respect of the said land and houses, and that it is also for the public interest that it should be made known that a person occupying the position of the said James Gill as a schoolmaster, to whom is entrusted the guidance of youth, was making unjust demands in respect of the said lands and houses, and was causing annoyance and alarm to ladies residing in and about Muizenberg, all of which acts, as well as the act of receiving money to which he was not entitled the defendant is prepared to verify as the acts of the said James Gill.

Wherefore he (the defendant) prays judgment, and that by the Court here he may be dismissed and discharged from the premises in the said indictment specified.

There was no reply filed to the plea, but on the suggestion of the Court it was excepted to, and the exception was sustained, and no evidence was

allowed to be led in support of the plea except such as might rebut the presumption of malice, which arose on proof of publication.

The prisoner was convicted and sentenced to pay a fine of £50, or undergo six months' imprisonment with hard labour.

Mr. Sheil, who appeared for the prisoner, requested that the following points should be reserved for argument before the Supreme Court:

1. Whether the exception taken to the third count of the indictment is good in law.

2. Whether evidence in support of the plea of justification ought to have been admitted.

These points now came on for argument.

Mr. Sheil, for the accused, as to the first point reserved contended that the exception was a good one and should have been sustained. The innuendo ought not to extend or enlarge the natural meaning of the language used, as it did in the present case.

As to the second point reserved, in no case previous to *Hirsch's*, in which a statutory plea had been filed, had evidence to establish the plea been withheld from the jury. Act 46 of 1882 was copied almost verbatim from Lord Campbell's Libel Act (6 and 7 Vic., cap. 96), and where a plea had been filed under the latter Act, evidence in support of it was never withdrawn from a jury except in cases of seditious, blasphemous, or obscene libels. "*Regina v. Duffy*" (2 Cox C.O. 45); "*Ex parte O'Brien*" (15 Cox, 180); "*Regina v. Newman*" (1 E. and B., 558); "*Regina v. Carden*" (14 Cox, 859); "*Regina v. Labouchere*" (14 Cox, 419); "*Regina v. Sullivan*" (11 Cox, 52).

Under Act 46 of 1882, section 8, it was clearly the intention of the Legislature that evidence should be given in support of the statutory plea.

It was purely a question of fact (1) whether the statements contained in the libels were true; and (2) whether it was for the public benefit that they should be published. Both were questions for the jury. The maxim *ad questionem facti non respondent iudices* applied. Evidence had been erroneously withheld from the jury, the prisoner was convicted on insufficient evidence, and the conviction should be quashed.

The Attorney-General appeared for the Crown, and on the question of deciding public benefit on demurrer cited the case of "*Regina v. Duffy*" (2 Cox. C.O., 45), and contended that the case was directly in point. It was for the judge to say whether a publication by means of postcards was for the public benefit or not. The plea was bad and the defendant was rightly convicted.

Mr. Sheil, in reply: Duffy's case was one of seditious libel, to which Lord Campbell's Act does not apply. Even if the plea did not conform to the statute is a man to be deprived of his liberty

because of a technical error in pleading, such is not the modern policy of the criminal law.

Cur ad vult.

Postea (6th March).

The Court delivered judgment.

Mr. Justice Buchanan said: At the last criminal sessions the appellant was tried before the Chief Justice on an indictment containing three counts, charging him with having committed the crime of publishing a defamatory libel. The offence was laid as having been committed by means of postcards sent through the post by appellant to Professor Gill, a schoolmaster, residing at Muizenberg. To the third count of the indictment the accused excepted, on the ground that the innuendo drawn from the postcard therein referred to was not justified by the words used, and that the construction placed upon the said words by the Crown was not warranted, nor was it a fair and reasonable interpretation of the language used. The accused also pleaded generally not guilty; and also specially justifying the libel, alleging that the publication complained of was justifiable in the public interest. This plea alleged the fact of the complainant's occupation as a reason why the publication was in the public interest, and contained certain statements in support of the allegation of truth, but made no allusion either to the manner in which, or time when, the libels complained of were published. To this plea the Crown excepted, as being bad in law. After argument the presiding judge overruled the exception to the third count of the indictment, and sustained the exception taken by the Crown to the plea. The trial proceeded, and on the prisoner's counsel tendering evidence in support of the truth of the charges, objection was taken, and the evidence was rejected by the Court, though considerable latitude was allowed to the prisoner in the admission of evidence for the purpose of negating malice. The accused was convicted, whereupon at the request of his counsel, two questions were reserved for the decision of this Court as the Court of Appeal in criminal cases, viz.: (1) Whether the exception to the third count of the indictment was good in law? And (2) whether evidence in support of the plea of justification ought to have been admitted.

As to the first question reserved, the words on the postcard mentioned in the third count were: "As you make it a practice of writing to ladies, or going to their houses when the husband is not there, I wish you would make a call when a husband is at home; I am sure you would get something." The innuendo drawn from these words was: "That the said Gill was a person of cowardly and disreputable character, who made a practice

of calling upon and intimidating married women to serve his own purposes, and in the absence of their husbands." The appellant's counsel contended that this was not the true interpretation of the words, and that the prisoner's meaning was a comparatively innocent one. That, however, would be a question for the jury. All that the presiding judge had to decide was whether or not the words used were capable of the meaning laid in the indictment, and ordinarily could be so understood. If the innuendo was one which could fairly be deduced from the words used, the indictment was good, though at the trial it would depend on the evidence what was their true meaning. This was so clearly laid down in the recent case of "*Rudd v. De Vos*" (2 Sheil, 398) that it is unnecessary to discuss the matter further. There an exception to a declaration was sustained on the ground that the words used could not be reasonably understood as supporting the meaning alleged; and I do not in principle see any distinction between an exception to a declaration and an exception to an indictment, in a similar matter. The question reserved does not dispute that it was the duty of the judge to decide the point, and the prisoner's counsel himself called for the ruling of the Court on his exception, so that on this part of the case there is no question as to the relative functions of judge and of jury. The objection raised is that the judge's decision was not a correct one. Looking at the indictment, in my opinion the exception was properly overruled. I think that the innuendo is reasonably and fairly deducible from the words used. This opinion is strengthened by the fact that the jury after hearing the evidence found a verdict of guilty on this count, though of course such a verdict would not necessarily be conclusive on the point. No great stress, however, was laid on this part of the appeal, the more important and main ground contended for being that raised by the second point reserved, namely, as to the rejection of evidence in support of the plea of justification. It is not necessary now to trace the history of the law of libel and its gradual development, as the point at issue has been based entirely on the construction of Act No. 46, 1882. The state of the law before the passing of this Act was discussed in the cases of "*The Queen v. Houghton*" and "*Wright*" (2 Buch. E.D.C. Rep., 86) and "*The Queen v. Shaw and Fennell*" (8 Buch. E.D.C. Rep. 323), from which cases and from the authorities there cited, and especially from Voet (47, 10, 9), it may be gathered generally that at common law truth was a good defence to a criminal charge where the publication was for the public benefit. The Act in question was passed shortly after the decision in *Houghton's* case, though it is but fair to state that there was a ruling in the High Court

at about the same time conflicting with that given in *Houghton's* case. Our common law, it appears to me, was very similar to that enacted by Lord Campbell's Libel Act (6 and 7 Vic., c. 96), but it will be seen that our subsequent local statute created additional restrictions. Act No. 46, 1882, requires that the truth of an alleged libel may be inquired into, but shall not amount to a defence in a criminal case unless it was for the public benefit that the said matters should be published in the manner in which and at the time when they were published, and to entitle the defendant to give evidence of the truth of such matters it shall be necessary for him to file a special plea of justification in compliance with the provisions of the 4th section of the Act. That section enacts that every plea of justification "shall allege that the matters charged in the said libel are true, and that it was for the public benefit that the matters should be published in the manner in which and at the time when they were published, and shall also set forth the particular fact or facts by reason of which it was for the public benefit that the matters should be so published." The words in italics are not in Lord Campbell's Act. The rule that the filing of a special plea complying with the requirements of the statute is necessary was exemplified in "*Fennell and Shaw v. Bayne* N.O." (2 Buch. E.D.C. Rep., 241), where it was held that at a preparatory examination on a charge of libel the Magistrate properly refused to allow the accused to lead evidence of truth. And similarly the Court of Queen's Bench, on a construction of Lord Campbell's Act in the "*Queen v. Carden*" (5 Q.B.Div., 1), unanimously affirmed the principle that the truth of a libel can only become a defence when the statutory conditions have been complied with; that is, when it has been pleaded as specified in the Act. For the appellant it has been contended that the sufficiency of the plea is a question for the jury and not for the Court. But is that so? It seems to me that there has been a confusion between the sufficiency of the plea and the sufficiency of proof. On the same ground upon which it was admitted that the question raised in the first point reserved, viz, whether or not the libel complained of supported the innuendo laid, was a question for the determination of the presiding judge, so in the same way the question whether or not the plea complied with the statute is for the judge to decide, and not for the jury. So far it was a question of pleading, not an issue of fact. This must be the ground upon which the English Courts, in construing the 6 and 7 Vic., c. 96, have held that libels against morality or religion and seditious libels cannot be justified under the statute, not because such libels are expressly excluded from the operation of the statute, but because the condition that the public

interest must be served could not possibly be complied with by such publications. Holding, as I do, that the judge must decide on the sufficiency of the plea to determine whether or not the ruling given in this case is correct, we must compare the plea with the statute, and see if it complies with its requirements. Assuming that all the allegations of the plea are true, does the plea show that the manner in which, and the time when, the alleged libels were published were for the public benefit? All we have is the bare fact that the libels were published by means of postcards sent through the post to the person defamed. There is no attempt to justify the manner of publication. I will not say that it is impossible to conceive circumstances under which such a manner of publication might be for the public interest, but none are stated in the plea, as the law requires that they should be. Personally I would not criticise such a plea too minutely, but the Legislature has deemed it proper to put special restrictions upon the freedom of the defendant in libel prosecutions, restrictions which, I venture to think, did not exist previously under our common law. Here the plea has entirely failed to comply with these restrictions. If any circumstances justifying the manner of publication could be stated by the accused or his counsel at the trial, the presiding judge has a large discretion as to allowing an amendment of the pleadings, but apparently not at the trial, and certainly not in argument before this Court, has any such set of circumstances been suggested. In the absence of any such circumstances, this seems to me just one of those cases that the framers of the Act intended to except from protection. It is in this particular that, in my opinion, the plea filed in this case wholly failed; and as that plea was excepted to *in limine*, and as the exception was sustained, and I think properly, the defendant was precluded from leading any evidence as to the truth of the charges made. In the course of argument a wider question was raised, namely, whether it is for the judge or for the jury to say if the publication was for the public interest. This is a matter beyond what we have now to decide, and as it cannot now be authoritatively settled I will not express any opinion thereon. Our present decision leaves it open, provided that the proper plea is filed. I may, however, refer to the charge of Shippard, J., in the case of the *Queen v. Shaw and Fennell* (8 Bush., E.D.C., 828.)

The question reserved must be answered against the accused.

Mr. Justice Upington concurred.

The Chief Justice said: I have not much to add to what I said at the trial. Two exceptions were then taken, the one on behalf of the defendant to the third count of the indictment, and the other on behalf of the Crown to the defendant's

plea, and both had to be decided upon before any evidence could be taken.

In regard to the first exception the decision was that, inasmuch as the words alleged in the third count to have been used by the defendant were capable of the meaning ascribed to them in the innuendo, the count was a good one, and it remained for the jury to decide whether the words did in fact bear the meaning.

This is also the view now entertained by the Court.

As to the second exception, I take the decision of the Court to be that a special plea of justification should set forth one or more facts by reason of which it was for the public benefit that the matters charged should have been published in the manner in which and at the time when they were published, and that if the matters have been published by means of post-cards addressed to the person defamed, but read by others belonging to his family, an exception to a special plea which does not set forth facts by reason of which it was for the public benefit that the matters should have been published in that particular manner is a good exception.

At the trial this exception was taken and allowed. It followed that no evidence could be allowed in support of the special plea of justification.

I only wish to add that, in my opinion, if the plea had not been open to the exception it would have been the duty of the presiding judge to leave to the jury the question whether the time and manner of publication were such as to serve the public interest.

[Defendant's Attorney, Gus Trollip.]

DIVISIONAL COUNCIL, BRITSTOWN { 1898.
V. CIVIL COMMISSIONER, BRITS- { Mar. 6th.
TOWN, AND ROUX.

Divisional Council—Election—Subsequent cancellation—Illegality—Civil Commissioner—Costs *de bonis propriis*.

Mr. Juta moved for an order declaring that the said Council is not liable for the costs incurred in the application made by Roux to restrain the Civil Commissioner from preventing him taking his seat as a member of the said Council; and further, for an order on behalf of the said Roux that the costs in question should be paid by the said Civil Commissioner.

The matter was before the Court on the 1st and 2nd February last, on which latter date judgment was given in favour of Roux, with costs against the present applicants unless they showed cause to the contrary on or before the last day of the February term.

Mr. Juta now appeared for the Council to show cause, and contended that they could not be ordered to pay costs, as they had been no party to the previous proceedings. At the time that the election of Roux was advertised and subsequently cancelled, the Council was not in existence, and consequently that the Civil Commissioner could not have acted as their chairman.

Mr. Schreiner, Q.C., appeared for Roux.

Mr. Searle appeared for the Civil Commissioner. He cited in argument "*Budge v. Hugo and Others*" (7 Juta, 346).

The Chief Justice said if the previous application had been made against the Civil Commissioner in his capacity as chairman of the Divisional Council, then the case quoted by Mr. Searle, "*Budge v. Hugo and Others*" (7 Juta, 346), would have applied. The present application was not made against the Civil Commissioner in his capacity as chairman of the Divisional Council at all; it was in his capacity as the officer who took the preliminary steps for the election of the Divisional Council. An objection was made to the Civil Commissioner by Jackson. The proper course which the Civil Commissioner ought to have taken was to have referred Jackson to the ordinary courts. Instead of that he took upon himself the responsibility to cancel the election which had already been declared, and having taken that initial illegal step, he became responsible for all consequences. The main object of the recent application was to have that proceeding of the Civil Commissioner set aside—to restrain the Civil Commissioner from preventing the applicant taking his seat. But at that time there was no Divisional Council in existence, and it did not appear that any one had taken his seat. In the circumstances his lordship felt the greatest difficulty in the way of making the Divisional Council pay the costs. The case did not fall under the provisions of the 59th section, nor of the 80th. It was certainly a most ungracious act on the part of the Divisional Council to object to pay the costs, but they were within their rights in objecting. The Court would order that applicant Roux's costs of the application of 2nd February last be paid by the Civil Commissioner *de bonis propriis*, and that each party pay his own costs of this day's application. His lordship supposed that the Government would pay the Civil Commissioner's costs, as he had acted perfectly *bona fide* in his official capacity. Of course this was merely an opinion—the Court could make it no part of the order.

Their lordships concurred.

[Applicants' Attorney, Gus Trollip; Respondents' Attorneys, Messrs. Van Zyl & Buissinck and Paul de Villiers.]

REGINA V. CORNELIUS BEUKES. { 1898.
Mar. 6th.

Master and servant—Act 18 of 1873, section 2, sub-section 2, and section 9—Conviction quashed on review.

This case came on review from the Special J.P. at Garies. The accused was charged with contravening section 2, sub-section 2, of Act 18 of 1873, in that on the 18th January last he absented himself from his master's service. The evidence showed that the prisoner had been hired at 1s. a day, that he went home to see his people and did not return. The case was dismissed, but as the accused was not present at the proceedings he was summoned under section 9, found guilty and sentenced to pay a fine of 26s. or to undergo one month's imprisonment with hard labour.

Mr. Justice Buchanan said: Section 9 only applies to cases in which there has been a conviction. As the accused was not convicted the 9th section does not apply, and the conviction must be quashed.

REGINA V. SABONIL AND DINA BOOMZAILER. { 1898.
Mar. 6th.

Master and servant—Act 18 of 1873, section 2, sub-section 2—Conviction quashed on review.

This case came on review from the Special J.P. at Frenchhoek. The accused were charged with contravening section 2, sub-section 2, Act 18 of 1873. They were found guilty, the first-named accused was sentenced to pay a fine of 10s. or undergo fourteen days' imprisonment with hard labour, and the second-named accused to pay a fine of 5s. or eight days' imprisonment with hard labour.

Mr. Justice Upington (before whom the case came) remarked that the sole evidence was that given by the prosecutor himself, who said that the accused lived on his farm in the same house with their parents. "The condition of their living on the farm being that I require them to work for me—they have to work for me." The father of the accused said: "The accused are their own mistresses. I have nothing to do with them. I don't know what their contract with the prosecutor was." Under these circumstances— notwithstanding a note from the Special Justice of the Peace to the effect that "the prevailing custom and condition among farmers here is that any servant living on the farm must work for the owner when he may require him"—his lordship was not able to come to the conclusion that the accused absented

themselves without leave or lawful excuse. It seemed to his lordship that there was no valid contract entered into as alleged by the complainant. At any rate the evidence was not sufficient to show that there was a valid contract, and the conviction must therefore be quashed.

LIPSCHITZ V. KUNNE. { 1893.
Mar. 6th

Contract—Alleged breach—Sheep—Delivery
—Damages—Costs—Appeal.

This was an appeal from a judgment of the Resident Magistrate of Cape Town in an action in which the appellant (plaintiff in the Court below) sued the respondent for £58 8s., being the value of certain 89 sheep, sold and delivered to the defendant by the plaintiff on or about the 14th January, 1893, at 12s. each.

The defendant pleaded:

1. The general issue.
2. That the plaintiff induced the defendant by fraud and misrepresentation to purchase the sheep from him.
3. That the plaintiff warranted the sheep to be good fat slaughter sheep, fit for killing, whereas they were unfit for use, and did not answer the warranty.
4. That plaintiff agreed that only the good fat sheep should be taken by defendant, and those out of condition returned.
5. That defendant tendered to plaintiff before summons the sum of £24 12s., less £5 5s. 8d. sterling.
6. That defendant has tendered, and again tenders, the remainder of the sheep to the plaintiff.

The defendant claimed in reconvention:

- (a) £5 5s. 8d., carriage paid on sheep.
- (b) £10 damages as breach of contract.
- (c) £4 14s. 4d. for keep of sheep.

The Magistrate gave judgment for the plaintiff for £9 6s. 4d., the balance of the sheep to be returned to the plaintiff, and the plaintiff to pay costs.

The plaintiff now appealed.

Mr. Schreiner, Q.C., was heard in support of the appeal, and contended that the finding of the Magistrate was wrong, as there had been no breach of contract.

Mr. Searle for the respondent.

The Chief Justice said the Magistrate had found that the contract was that the defendant had the right to select as many sheep as he could use for his trade purposes and reject those which he could not use. In fact, the defendant did select forty-one sheep which he used for trade purposes, but he now claimed damages for breach of contract. The breach of contract consisted in the

plaintiff not having delivered good sheep to him. But it must have been implied in the contract that among the sheep there might be bad ones, and therefore the fact that there were bad ones among the sheep gave no right of action. The Magistrate had given damages, but in his lordship's opinion there was no breach of contract in respect of which damages could be awarded. In regard to the keep of the sheep, there was no evidence whatever as to what it cost to keep the sheep. Under these circumstances, his lordship was clearly of opinion that the Magistrate was wrong, and that the judgment ought to have been for £19 6s. 4d. That amount was arrived at by deducting £5 5s. 8d., carriage of the sheep, which had been paid here, from the £24 12s. The judgment of the Court would therefore be for £19 6s. 4d. The appeal would be allowed with costs in this Court and in the Court below.

Mr. Justice Upington was of the same opinion. If there had been any evidence to show that something ought to be paid for the keep of the sheep, he should have accepted it, but there was no evidence whatever.

[Appellant's Attorney, C. C. Silberbauer; Respondent's Attorney, D. Tennant, jun.]

HOFMEYER V. GOUS. { 1893.
Mar. 6th

Pledge—Sale—Delivery—Re-delivering—
Execution creditor—Judicial attachment
—Interpleader suit—Preference.

Where a transaction which in form is a sale is really intended to be a pledge the Court will, at the instance of the pledgor's creditors, treat it as a pledge with all its incidents.

An insolvent executed a so-called "deed of sale" whereby he purported to sell certain goods to his father, for the amount of a debt due to the father and the latter agreed that the sale should be considered as cancelled upon payment of the debt.

Upon the execution of the deed of sale the goods were delivered to the father, but were afterwards allowed to remain in possession of the son as his own property.

Held, in an interpleader suit between the father and an execution creditor of the son, at whose suit the goods in the possession of the son had been attached, that the attachment gave the creditor priority over the father.

The cases of Keyter v. Barry's Executor (Buch. 1879, p. 175) and Quirk's Trustees

v. Assignees of Liddle (3 Juta, 322) commented upon.

This was an appeal from a decision of the Resident Magistrate for Malmesbury in an interpleader action, in which the present respondent claimed certain goods attached by the Messenger of the Court in execution of a judgment given in favour of the present appellant in an action against the respondent's son.

The Magistrate held that the goods had been sold by the younger Gous to his father, that the goods attached were the property of the latter, and set aside the messenger's attachment. He based his decision on *O'Callaghan's Assignees v. Cavanagh* (2 Juta, 122), *Dunell, Ebdon & Co. v. Colonial Government* (4 H.C.R., 48), *Verwey, N.O. v. Malcomson & Co.* (9 C.L.J., 178) and *Potter, p. 198*).

The judgment creditor now appealed.

It appeared from the evidence taken at the trial that Gous, jun., became insolvent in 1886 and that the goods attached in the action "*Hofmeyr v. Gous, jun.*," had been given to the defendant by his creditors, and he alleged that he subsequently sold them to his father, one of the conditions of sale being that he could use the goods until he had paid his father certain moneys which he owed him.

He alleged that there had been a delivery of the goods to his father and that a deed of sale had been drawn up, but that he (Gous, jun.) had remained in possession of them since 1887.

Mr. Juta was heard in support of the appeal, and contended that the transaction between Gous, jun., and his father was a pledge and not a sale.

Mr. Searle, for the respondent, cited "*Keyter v. Barry's Executor*" (Buch., 1879, p. 175), and urged that in the present case there had been a sale out and out, but with a resolutive condition.

The Chief Justice said: There is no reason to find fault with the law laid down by the Magistrate. If the transaction between father and son was really a sale, then the delivery to the father would have been sufficient to vest the property in him.

But it does not follow that because they called it a sale and produced a document headed "deed of Sale" the Court is bound to treat it as such.

There is not a more common device than that by which a pledge of goods is effected under the guise of a sale.

The pledgor purports to sell the goods for the amount of a debt owing by him and actually delivers them to the pledgee, but at the same time it is understood that the goods are to be re-delivered to the pledgor until the creditors or any of them assert their right to attach them, when the pledgee is to come in as the owner by virtue of

the alleged contract of sale. Rightly or wrongly, our law refuses to recognise such an arrangement as a sale but treats it as what it really is, a pledge.

It matters little in the present case whether the son's debt was incurred before or after insolvency! In either case the only object of the parties was to secure the debt due to the father, and at the same time to allow the son to use the goods as his own.

If the debt was a *bona-fide* one the father would have had the benefit of the security so long as he remained in possession of the goods, but having delivered the goods to the son to hold them on the son's behalf, his right of preference was defeated by the subsequent judicial attachment made on behalf of the execution creditor.

The case of *Keyter v. Barry's Executor* (Buch 1879, p. 175), which has been relied upon for the respondent, does not assist him in the least. There the purchaser was the judgment debtor and execution was allowed to issue against the goods bought by him and found in his possession.

The sole question to be determined was whether the pact annexed to the sale implied a suspensive or resolutive condition, and the Court held that the condition was resolutive, and that the property in the goods had passed to the purchaser.

A similar question arose in the subsequent case of *Quirk's Trustees v. Assignees of Liddle* (3 Juta, 322), but there the Court held that the terms of the pact were such as to make the condition suspensive, so that there was no sale, and consequently no vesting of the *dominium* in the person to whom the goods had been delivered.

In the present case there can be no question of conditions if a pledge and not a sale was intended.

The Court being of opinion that the transaction amounted to a pledge, it follows that the appeal must be allowed with costs.

Their lordships concurred.

[Appellant's Attorney, H. P. du Preez; Respondent's Attorneys, Messrs. Van Zyl & Buissinne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.O.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.] 1898. Mar. 7th.

EX PARTE SPAAN.

Mr. Watermeyer moved for the admission of Johan Spaan, translator in the English and Dutch languages. Applicant was resident at Barkly

East, and the oath would have to be taken before the Resident Magistrate there.

The Court made the order.

IN THE ESTATE OF LE ROUX.

Mr. Schreiner, Q.C., for petitioners, moved for the appointment of a *curator ad litem* to represent the minor children of Abraham J. Wannenburg in the proceedings about to be instituted for a declaration of rights in the said estate.—Mr. Juta was appointed *curator ad litem*.

NESBITT V. NESBITT.

On the motion of Mr. Webber, the return day in this matter was extended to the first day of next term.

HAYTER V. SCOTT BROTHERS.

On the motion of Mr. Graham, a rule nisi was granted calling upon defendants to show cause why plaintiff should not be allowed to sue them *in forma pauperis* in an action for wrongful dismissal.

MBANA AND OTHERS V. ZENZILE. { 1893. Mar. 7th.

Hire—Wagon—Loss—Act of God—Alleged negligence—Liability—Summons disclosing no cause of action—Exception sustained on appeal.

This was an appeal from a judgment of the Resident Magistrate for St. Mark's in an action in which the present respondent sued the appellants, Mbana, Silo, and Dambaza (the latter a minor son of one Shweni, deceased, being assisted by his uncle Kilosi), for the recovery of £38 12s. 6d., share of a certain wagon, the property of one Mgxunyeni, destroyed by the Qamata River whilst in the possession of the defendants under loan.

The summons alleged that in or about October, 1891, the plaintiff, at the request of and in conjunction and agreement with the defendants Mbana, Silo, and Shweni, deceased, borrowed a certain wagon, the property of one Mgxunyeni, who consented to lend, and duly lent the same, for the purpose of proceeding to Qamata to load and bring to their respective homes at Nququ a number of bags of grain, and that while the wagon was in the use of plaintiff and the defendants it was totally destroyed and lost in attempting to cross the Qamata stream, which became flooded while the wagon was in the drift, and was washed down the stream together with the grain thereon loaded.

That in consequence of the loss of the wagon he (the plaintiff) had to find another wagon for Mgxunyeni, which he delivered to him, and for which he paid the sum of £51 10s., and now claimed from the defendants the sum of £38 12s. 6d., being their share of the damage sustained and made good by the plaintiff after deducting his own share.

That Dambaza (the last-named defendant) was the eldest son and heir of the estate of Shweni, now deceased.

The plaintiff prayed that the defendants might be adjudged to pay the sum of £38 12s. 6d., jointly and severally, with costs of suit.

The defendants excepted to the summons, and said that the loss of the wagon was an act of God for which they were not liable, and that if any action did lie against them, it should have been brought by the man Mgxunyeni, from whom it was stated they jointly with the plaintiff borrowed the wagon.

This exception was overruled.

The defendants then pleaded the general issue.

The plaintiff in his evidence stated *inter alia* that the wagon was borrowed on behalf of himself and the defendants for the purpose of loading up grain, that all the defendants, except Silo, were present when his (the plaintiff's) grain was loaded up. That they inspanned to fetch Silo's grain from the Qamata Basin, that on their arrival at the river (Qamata) it was not full, but that the wagon stuck in the drift, and as Mbana and the other young men tried to pull it out, the river came down, taking with it the wagon and the grain. They subsequently recovered the front axle and two wheels. That the plaintiff and Mbana brought the damaged parts to one Grady, a blacksmith, and asked him to repair it, which he did at a cost of £51 10s., paid on plaintiff's account by his chief.

Matansima Mtirara (the Emigrant Tembu Chief before whom the case was tried before being brought to the Magistrate) gave the following evidence: I remember Zenzile asking me to pay for a wagon at Mr. Grady's. I paid Mr. Grady £51 10s. for this wagon. I received from the plaintiff eight head of cattle, but this payment does not represent what I have paid on Zenzile's account, £51 10s. Zenzile brought this matter to me for settlement.

The defendants did not deny that the wagon was destroyed while in their use; they admitted it.

Mbana admitted that they took the wagon to Mr. Grady, and that he (Mbana) paid £1.

Matas (Mbana's wife), in her evidence, stated that she had warned the plaintiff, it being raining at the time, not to inspan, as the oxen were only calves.

The Magistrate gave judgment for the plaintiff for £38 12s. 6d., with costs, the following being

his reasons: In this case I take it the plaintiff and defendants join issue on the latter's plea, *actus Dei*. From the evidence it is clear that the river did not come down in flood immediately the parties in this case with the wagon entered the Qamata drift. The weather was such as to make the people in the neighbourhood of the river anticipate the possibility of the river rising in the manner it did. There was nothing to show that the wagon could not have been off-loaded after entry in the river and before the flood. Thus through inadvertence the wagon appears to have been lost, and it is therefore not attributable to *actus Dei* when the calamity might have been averted by the off-loading of the wagon or the exercise of sufficient caution before entering the river.

From this judgment the defendants now appealed.

Mr. Graham was heard in support of the appeal, and contended that there had not been such negligence on the part of the defendants as to justify the Magistrate's judgment.

Mr. Juta, for the respondent. The decision of the Chief showed that the defendants were liable by Kafir law, and the Magistrate took the same view. Apart from this there was sufficient evidence of negligence.

Mr. Graham, in reply: The Chief's judgment cannot be relied upon, as he was an interested party, having advanced the money to pay for the repairs to the wagon.

The Chief Justice said this was a case between natives, but it was not alleged by the Magistrate in his reasons that he had decided the case under native law, or that there was any difference between our law and the native law with regard to the liability of borrowers or hirers. Now, in the first place, the summons disclosed no cause of action. The summons alleged that the plaintiff had, on behalf of himself and other parties to the suit, borrowed a certain wagon, and that after a while, when the wagon was in the use of the plaintiff, it was totally destroyed in attempting to cross the Qamata stream, which had become flooded while the wagon was in the drift, and that it was washed down the stream. On the face of it this was an allegation that it was the act of God. There was no allegation of the slightest degree of negligence on the part of plaintiff or his men. Defendants excepted to the summons, and said that the loss of the wagon was the act of God, for which they were not liable. He thought the exception was a good one, and that the Magistrate ought to have allowed it. When they came to the evidence, it was not quite clear that it was not the act of God which occasioned the accident. Negligence was not to be proved by the fact that one woman had said, "It is rainy and slippery; you had better not cross." That was a remark which a woman might make without creating any im-

pression on the mind of a man who was going to cross the river. He could not suppose that the river would be so suddenly flooded as to carry away the wagon, oxen, and every thing on it. Certainly they took the same care with the wagon that they did with their own property, their own grain was in the wagon. The oxen belonged to them. His lordship did not think there was sufficient proof of negligence to hold the defendants liable. If there was proof of negligence, it was really plaintiff who was liable. He was the man who borrowed the wagon, and seemed to have taken a very active part in the management of the affair. Therefore his lordship thought this exception ought to have been allowed. Not having been allowed, he was of opinion that the evidence was not sufficiently clear to shew that there was such negligence on the part of defendants as to render them liable. There was some consideration to be given for the use of this wagon. It seemed to have been an understanding between them, "that the payment for the use of the wagon should have been the loan of oxen by defendants to Mgxunyeni." Therefore if it was a hire the same strictness and care would not be required as in the case of borrowing. If it were a case of borrowing his lordship was not clear that the evidence showed negligence. Plaintiff chose to pay the owner of the wagon. It was a generous act, but if he could not be compelled to pay the owners he could not recover contribution from the others. With regard to Mgxunyeni, if the summons had been differently drawn the Court must have given judgment against Mbana. But there was no allegation in the summons that there was any promise on the part of defendants to pay for the wagon, so that under the summons they could not attach any liability to Mbana. The appeal would therefore be allowed, and the exception in the Court below sustained with costs.

Their lordships concurred.

[Appellants' Attorney, C. C. Silberbauer; Respondent's Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, {
K.C.M.G. (Chief Justice), Mr. 1893.
Justice BUCHANAN, and Mr. Mar. 18th.
Justice UPINGTON, K.C.M.G.}]

PROVISIONAL ROLL.

SOUTH AFRICAN LOAN COMPANY V. STATEM.

Mr. Molteno moved for provisional sentence

for £890, with interest upon a mortgage bond at 9 per cent. per annum from July, 1890.
Granted.

VILJOEN'S TRUSTEES V. SNYMAN AND OTHERS.

Mr. Maskew moved for provisional sentence for £108 6s. 8d.
Granted.

SEARLE'S ASSIGNEE V. VAN RENSBURG.

Mr. Molteno moved for judgment upon four promissory notes for £60, £18 18s. 6d., £18 10s., and £74.
Granted.

S.A. ASSOCIATION V. MEWES.

Mr. Maskew moved for the final adjudication of defendant's estate.
Granted.

MASTER SUPREME COURT V. FARNDILL'S EXECUTRIX.

Mr. Giddy moved in this matter, calling upon respondent to file an account in terms of the ordinance.

The Court made the usual order, with costs *de bonis propriis*.

MASTER SUPREME COURT V. FERREIRA'S EXECUTORS AND WEBBER'S EXECUTORS.

The Court made a similar order in these applications.

REITZ V. SALOMON.

Mr. Joubert moved for provisional sentence on a mortgage bond for £155.
Granted.

FLETCHER AND CO. V. JAMES.

Mr. Buchanan applied under rule 829 for costs in this matter, the principal sum having been paid.

Granted.

BIGGINS V. GRIFFITH AND ANOTHER.

Mr. Webber moved for judgment, under rule 829, against the first-named defendant for £816 6s. 1d., and against the second defendant for £52 5s.

Granted.

MARAIS V. BAARTMAN.

Mr. Maskew moved for judgment for £146 18s.
Granted.

LE SUEUR'S EXECUTORS V. GOLDWORTHY.

Mr. Jones moved for judgment for £28 10s., being house rent due.
Granted.

BRUTON V. MOSS.

Mr. Rubie moved for discharge of the provisional order of sequestration.
Granted.

TRUSTEES, ORANGE RIVER ASBESTOS { 1898.
COMPANY V. HIRSCH and OTHERS. { Mar. 18th
Privy Council—Appeal—Costs—Security.

This was an application for leave to the defendants to appeal to Her Majesty in Her Privy Council against the judgment of the Supreme Court in the appeal of both parties from the High Court.

Mr. Graham appeared for petitioners, Hirsch, King, and Weingarten.

Mr. Schreiner and Mr. Searle appeared for the company, who also entered a cross appeal.

Mr. Schreiner said he did not object to petitioners' application. He, however, read an affidavit showing that the defendants King and Hirsch were not within the jurisdiction of the Court, and that Weingarten's estate was not sufficient security. Respondents were now appealing to the Privy Council, and he wanted the Court to order them to give security for the amount of the judgment pronounced against them on March 2, viz., £10,875. At present they could not get satisfaction of the judgment.

The Chief Justice: Unless they pay £10,875 they cannot appeal.

Mr. Schreiner: That is precisely what we want. He referred the Court to the 50th section of the Charter of Justice, relative to appeals to the Privy Council, and said it was not clear that they could not appeal even if they had only 5s. in the jurisdiction; but if there was any doubt the Court should rather suspend execution of judgment here, and make respondents give security for £10,875.

The Chief Justice: With regard to your cross appeal, it is rather awkward that you should have consented to the judgment. You stated in your argument that if you got £10,875 you would go no further.

Mr. Schreiner contended that immediately after his lordship had delivered judgment he (Mr. Schreiner) intimated that his clients would re-

serve their right as to the claim for £1,446. They had not abandoned that position. Moreover, they did not depart from their original claim for £14,000.

Mr. Justice Buchanan : If you go on appeal you intend to get £14,000.

Mr. Schreiner : We do, and nothing debars us from that right.

The Chief Justice : Although the law is on your side it is a most imprudent course.

Mr. Schreiner : Your lordship will see that if we did not cross appeal it would be impossible in the Privy Council to raise the question of £1,446.

Mr. Graham said the position of Mr. Schreiner's clients was really improved by the respondents' appeal. They pointed out in their affidavit that respondents had not assets within the jurisdiction to satisfy the judgment.

The Chief Justice : Is it proposed to give security, or is the judgment to be put in execution ?

Mr. Graham : We are prepared to give security.

Mr. Schreiner thought it would be better to allow respondents to give security for the satisfaction of the suspended judgment.

The Chief Justice said : We think that the better course would be that security should be given by defendants instead of execution being ordered, because it is not quite clear as to whether the appeal could not go on. In view of this difficulty it would be better to adopt the course originally suggested—defendants to find security for £10,875. We allow plaintiffs to appeal upon their giving security.

[Applicant's Attorneys, Messrs. Fairbridge & Arderne and Messrs. Van Zyl & Buissinne ; Attorney for the Company, Gus Trollip.]

IRVINE V. IRVINE. } 1893.
Mar. 18th.

Mr. Maskew moved to make absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action against her husband for a judicial separation, and for an order entitling petitioner to have the custody of the children of the marriage.

Defendant, who appeared on his own behalf, made certain allegations about his wife's conduct, and said he would like to apply for a divorce. He admitted she was a pauper.

The Chief Justice said the rule would be made absolute, and he directed Mr. Maskew to make inquiries as to whether the allegations against plaintiff were true or not. Meantime defendant could if he chose send in a petition to the Registrar for leave to sue for a decree of divorce.

BANK OF AFRICA V. DANIEL. } 1898.
Mar. 18th.

Registration of title should not be ordered under Act 28 of 1881 unless the petition discloses prima facie proof that the petitioner had by prescription, contract or otherwise acquired the just and lawful right to the ownership of the land sought to be registered.

On a petition stating that the petitioner's predecessors in title had purchased from W. certain plots of ground bounded on one side by a passage to the use of which the purchasers were to be entitled, that the plots had been duly transferred to such purchasers, and that the petitioner was now the sole owner of these lots and no longer required the passage as such.

Held, that, the presumption was that W. intended to reserve the ownership in the land beneath the passage to himself and that, in the absence of any proof to rebut that presumption, there was no prima-facie case to entitle the petitioner to registration of such land in his own name.

Mr. Searle appeared for the petitioner, the general manager of the Bank of Africa, and moved to make absolute the rule nisi granted on the 19th January, 1893, for registration in the name of the said bank of certain portion of the south-eastern moiety of erf No. 19 in Port Elizabeth, reserved as a passage or lane, at present registered in the name of John C. Welsford.

The facts are as follows :

The petitioner is the registered owner and proprietor under two deeds of transfer, dated respectively the 18th of January, 1887, and the 21st April, 1892, of the whole of the south-eastern moiety of erf No. 19, situate in the town of Port Elizabeth, with the exception of (1) a certain portion thereof in extent 14 square roods and 58 square feet now standing registered in the name of Louisa Charlotte Louney under deed of transfer dated 15th July, 1876, and (2) a further portion thereof in extent 20 square roods and 12 29 square feet reserved as a private passage or lane for the exclusive use of the proprietors of those portions of the said south-eastern moiety of the said erf adjoining the said private passage or lane.

The whole of the said south-eastern moiety of the said erf No. 19 was originally transferred to one John C. Welsford on the 30th August, 1822, but was thereafter sub-divided and different sub-

divisions were at various times transferred to successive proprietors until by the said deeds of transfer on the 18th January, 1887, and 21st April, 1892, the petitioner became and still is the registered proprietor of all the sub-divisions of the said moiety of the said erf with the exceptions set forth above.

The sub-division, in extent 14 square rods and 58 square feet, now standing registered in the name of the said Louisa Charlotte Louney, does not adjoin, and is not connected in any way with the said portion reserved for a private passage or lane, nor has it at any time adjoined or been connected therewith.

The petitioner by virtue of the before-recited two deeds of transfer in his favour is the proprietor of all the sub-divisions of the said moiety of the said erf No. 19 adjoining or in any way connected with the said portion thereof reserved for a private passage or lane.

The said passage or lane still stands registered in the name of John C. Welsford by virtue of the said deed of transfer of the 30th August, 1822.

Petitioner was informed that the said Welsford had been dead many years and that there was no representative of his estate.

The petitioner claimed, by virtue of the above-mentioned facts, to be entitled to the sole use and occupation, and to have acquired the just and lawful right to the ownership of the said passage or lane, and he prayed that registration in his name might be ordered by virtue of Act 28 of 1881.

Mr. Searle was heard in support of the petition and contended that the bank was entitled to have the passage in question registered in their name. The passage had been set apart for the use of the owners of the adjoining lots, all of which had been acquired by the bank.

He referred to section 2 of the Act 28 of 1881 and to "Porter v. Phillip" (Buch. 1876, p. 192); "Ohlsson's Cape Breweries (Limited) v. Whitehead" (9 Juta, 84); "Hiddingh v. Topps" (4 Searle, 107); "Hofmeyr's Executors v. De Waal" (1 Juta, 424).

Mr. Graham appeared for the respondent (the wife of Welsford's grandson), but was not called upon.

The Chief Justice said: Act 28 of 1881 was intended to afford a summary process for registration of titles in cases where, on the face of the petition, it is made to appear that the petitioner had by prescription, contract or in any other manner acquired the just and lawful right to the ownership of immovable property registered in the name of any other person.

According to the petition in the present case the land in question is still registered in the name of Welsford. He had transferred to the petitioner's predecessors in title certain plots of ground, with a

right to the use of a certain private passage or lane, and it is the land beneath this passage or lane which the petitioner seeks by this summary process to have transferred into his own name from that of Welsford.

He has become the owner of all the lots and he contends that as he no longer requires the passage as such he may claim the ownership of the soil as his own.

Reliance has been placed upon *Ohlsson's Breweries v. Whitehead* (9 Juta, 84) and the cases there cited, but they really have no application.

It has been held that representations made at a sale by public auction on behalf of the seller of plots of ground bounded by roads might, under certain special circumstances, debar him from claiming the ownership in any road as against purchasers of plots on both sides of the road. In the present case it does not appear that the sale was by public auction or that any such special circumstances exist, and it is certain that the plots purchased by the petitioner bound the passage on one side.

The presumption, therefore, that Welsford intended to reserve to himself the ownership of the land beneath the passage has not been rebutted. Exception has been taken to Mrs. Daniel's right to object to the rule being made absolute, but as she is a near relative of the late Mr. Welsford, who has left no other representatives, she has a *locus standi* to raise the objection. Quite independently, however, of her objection I am of opinion that this is not a case in which registration of title should be ordered under the Act.

The rule nisi must therefore be discharged with costs.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

GRAHAM V. GRAHAM. { 1893.
Mar. 13th.

Mr. Graham, for petitioner, moved for leave to sue in *forma pauperis* in an action against her husband by edictal citation for restitution of conjugal rights, failing which for divorce.

Referred to counsel.

In re STEENKAMP AND VAN DER WESTHUIZEN V. DE VILLIERS AND OTHERS, { 1893.
Mar. 13th.

Costs—Taxation—Rule of Court 315, section 12—Review.

This was an application upon notice for:

(a) A review of the taxation by the taxing

officer of the bill of costs of the respondents (plaintiffs in the action) in respect of the allowance to A. T. Wiese of the sums of £6 5s. for travelling expenses and £2 2s. for attendance.

(b) A review of the taxation by the taxing officer of the bill of costs of the applicants, and for an order declaring that of the total costs of the applicants incurred in the suit, taxed as between party and party, four-sixths should be paid by the respondents.

On the 21st February, 1898, the Court gave judgment in a suit in which the respondents (three in number) were plaintiffs, and the applicants (six in number) were defendants.

By the said judgment two of the defendants (now applicants), Aletta Isabella de Villiers and Martinus David Christian Ras, were ordered to pay the costs of the plaintiffs (now respondents) and the plaintiffs were ordered to pay such costs of the remaining defendants, four in number, as the latter had necessarily incurred by reason of having been joined as co-defendants.

On the 3rd March instant the plaintiffs' bill of costs was submitted to the taxing officer for taxation.

In the schedule of witnesses' expenses, attached to the said bill of costs, appeared the following items, alleged to have been paid to A. T. Wiese, who gave evidence for plaintiffs:

One day's journey from his farm to the nearest railway-station, one day's journey by rail, two days' return journey, one day in Cape Town:

Five days at 10s. 6d ...	£2 12 6
Cart hire ...	2 2 0
Railway fare (return ticket)...	7 17 6

£12 12 0

It was admitted by the attorneys for the plaintiffs that Wiese had come to Cape Town without having previously received a subpoena, and that no subpoena had been served upon him until after his arrival here, and moreover that he had not come up in consequence of any express mandate from the said attorneys. An objection was thereupon taken to the allowance of the sums of £2 2s. for cart hire, £7 17s. 6d. for railway fare, and £2 2s., portion of £2 12s. 6d. for personal allowance.

On the 6th March instant the defendants' (now applicants) bill of costs was submitted to the taxing officer for taxation against the plaintiffs.

It was contended for the defendants that the said bill should be taxed between party and party as a whole, and that four-sixths of the sum thus arrived at should be allowed against the plaintiffs.

In support of this contention it was pointed out that each of the defendants was liable for a one-sixth share of the costs of the defence, and that such one-sixth share represented the costs actually incurred by each of the four successful

defendants by reason of his having been joined as a co-defendant in the suit.

It was further pointed out that nothing in the said judgment contained could be construed to cast upon the defendants, Mrs. De Villiers and Ras, payment upon any portion of the costs so incurred by the other four defendants.

The taxing officer, however, held that only such costs of the defence should be allowed against the plaintiffs as would not in any case have been incurred had the said four defendants not been joined in the suit.

The costs of the defence amounted to the sum of £64 19s. 1d., and of this the taxing officer allowed against the plaintiffs the sum of £5 8s. 7d.

The taxing officer's report was in the following terms:

I came to the conclusion that Wiese had been specially asked to attend the Supreme Court to give evidence which was material, and that he came to Cape Town for no other purpose than to be present at the hearing of the action.

I held that it was not necessary for a witness to be formally subpoenaed in order to entitle him to his expenses as a witness (see Rule of Court 815, section 12 and more particularly the words "or produced").

The present case was distinguished by me from Swemmer's " (Thwaites v. Municipality of George," Supreme Court, 5th July, 1887), as I was clearly satisfied that the witness came to town solely for the trial.

COSTS OF FOUR DEFENDANTS.

In face of the express wording of the judgment, I could not agree with the contention of the attorney for the defendants that his bill of costs should be taxed as a whole, and that four-sixths of the sum thus arrived at should be allowed against the plaintiffs.

The position I took up is practically that stated in section 10 of Mr. Moore's (the defendant's attorney) affidavit.

I allowed certain costs specially incurred by the four defendants, but if I had once gone into the question of what portion of counsel's fees, for example, the four defendants should pay, I should have been departing certainly from the spirit of the Court's order, which I interpreted to mean that the two defendants, who had to pay the plaintiffs' costs should be liable to one-half each of general costs of defence, as opposed to only one-sixth, as contended for by the defendant's attorney.

The whole of the costs which were rejected by me would have been incurred even if there had been only the two unsuccessful defendants, as it did not appear to me that the other defendants had incurred any special costs other than these I have passed,

Mr. Schreiner, Q.C., was heard for the defendants, and contended that a witness was not entitled to his expenses unless he had been subpoenaed.

As to the second objection the defendant's costs should have been taxed as a whole, and the plaintiffs were clearly liable for four-sixths.

Mr. Jones, for the plaintiffs, was not called upon.

The Chief Justice said he certainly thought that in regard to the first objection to the taxation it was very much safer for a litigant to subpoena all his witnesses, because there was always a danger that the taxing officer might not be satisfied that a particular witness was intended *bona fide* to come to the Supreme Court for the purpose of giving evidence. But his lordship was not prepared to lay down the rule which Mr. Schreiner wished—that in no case was the witness entitled to expenses except he had come on a subpoena. If the taxing officer was satisfied that the witness had been requested to come to the Court, and that he came *bona fide* from the country for the purpose of giving his evidence, he was quite justified in allowing him his expenses. In regard to the second objection, they must take it now that the judgment of the Court had not been appealed from, and taken in that view he was satisfied that the taxing officer had properly interpreted the order of Court. The second objection must also be overruled, and the appeal dismissed with costs.

Their lordships concurred.

[Applicants' (Defendants) Attorney, W. E. Moore; Respondents' (Plaintiffs) Attorneys, Messrs. Van Zyl & Buissinué.]

PETITION OF JANLIEN HABIG. { 1898. Mar. 18th.

Mr. Maakew applied for an order directing the Registrar of Deeds to allow transfer of certain portion of the land marked V in the village of Paarl, sold by petitioner without the production of a power of attorney from her husband, who deserted her in 1887, and has never contributed anything in support of petitioner.

Granted.

IN THE MATTER OF ARTHUR NICHOLSON.

Mr. Graham applied for the appointment of a *curator ad litem* to represent the said Nicholson alleged to be a lunatic, in proceedings about to be instituted to have him declared of unsound mind, and incapable of managing his affairs.

The Court appointed Mr. Molteno as curator, the rule to be returnable on 1st May.

In re CAPM OF GOOD HOPE BANK, { 1898. IN LIQUIDATION. { Mar. 18th

Mr. Schreiner presented for the sanction of the Court a list of compromises effected with debtors of the bank.

The Court sanctioned the compromises.

The following is the list of compromises:

Bruce, Maner & Co., Port Elizabeth, owe £4,688 12s. 6d., offer £150 cash paid, two promissory notes of £50 each, all securities in the bank's possession; release conditional on due payment of promissory notes, failing which the whole indebtedness is to remain in force, and sum or sums paid to be forfeited.

J. F. J. Ourlewis, Potchefstroom, owes £1,794 6s. 4d., and offers £25 cash paid and all securities in bank's possession.

Estate of James Wroe (deceased) owes £3,070 11s. 8d., and offers £200 against cession of the bonds which are held by the bank over portion erf 89, Potchefstroom, guaranteed by the Potchefstroom Board of Executors, and all securities in the bank's possession.

A. W. Francois, Johannesburg, owes £6,982 16s. 4d., and offers £100 cash paid and all securities in the bank's possession.

Arthur Millar and O. J. Palmer, Johannesburg, owe £1,722 14s. 2d., and offer £70 cash paid and all securities in the bank's possession.

Edward Pickering, Port Elizabeth, owes £46,992, and offers £125 cash paid, three promissory notes of £125 each, due respectively 5th April, 5th July, and 5th October next, and all securities in the bank's possession; release to be conditional on due payment of the promissory notes, failing which the whole indebtedness to remain in force, and the sum or sums paid to be forfeited.

H. O. Romyn, Pretoria, owes £2,020 14s., and offers £220 cash paid, and all securities in bank's possession.

CANE V. WYNBERG MUNICIPALITY. { 1898. Mar. 18th.

Licence to quarry—Lease—Grantee with notice of incumbrance—Interdict—Costs.

The Government, having granted a quarry licence to C. to quarry granite upon certain Crown land, made a grant of the land to W., who thereupon ordered C. to remove from the land and threatened to arrest his workmen if he refused.

It appeared that W. before receiving the grant was aware that C. had for several years been quarrying granite by permission of the Government and might have ascertained the exact nature of his rights by reference to him.

Held, that, *C. was entitled to an interdict restraining W. from carrying out his threat before the expiration of the year for which the licence had been granted.*

This was the return day of a rule *nisi*, operating as an interdict, which was granted on the 10th March, restraining the Wynberg Municipality from stopping, or in any way interfering with, applicant's quarry works at Wynberg, pending an action to be brought against the said Municipality by applicant for a declaration of rights, and due notice being given to applicant under his contract, on the ground that the said Municipality accepted the grant from Government of certain land, including the said quarry, with full knowledge of applicant's rights; and for an order for payment of costs in connection therewith.

Mr. Searle now moved that the rule *nisi* should be made absolute.

It appeared from the petition that the applicant entered into a contract with the Government by which they granted to him the right to quarry and remove certain granite rocks from certain Crown land situate at Wynberg, for which he paid £8 per annum licence, the Government reserving to themselves the right to cancel the agreement by giving two months' notice to that effect.

On the 18th February, 1893, the Government granted the land containing this quarry to the Wynberg Municipality for a public park under Act 16 of 1887, section 10, without giving applicant the two months' notice as required by their agreement with him.

Applicant alleged that at the time, and for a considerable period before, the grant was made by the Government to the Municipality the latter body was fully aware of the fact that a contract existed between himself and the Government.

On the 20th February applicant wrote to the Municipality asking permission to carry on his quarrying operations.

To that he received the following reply from the Town Clerk:

I am directed to acknowledge the receipt of your letter of the 20th February, 1893, asking for permission to quarry stone on ground lately transferred to this Council for the purpose of a public park, and have in reply to state that the Council is not in a position to grant your request, and further you are required within three days from date to stop all further quarrying and to remove within fourteen days from date all material and plant belonging to you, as well as all stone suitable for your trade purposes, the debris or waste stone only excepted.

On 8th March the inspector in the employment of the Municipality stopped applicant's men from

working in the quarry and threatened to arrest any of them found on the quarry works.

The applicant stated that if the Municipality should be allowed, without giving the required two months' notice, to stop his working, he would suffer damage and loss, as he would be compelled to immediately dismiss men whom he had to engage specially for this class of work, and be rendered unable to fulfil certain orders on hand, and become liable in damages therefor.

On these grounds the applicant prayed for an interdict.

The Mayor of Wynberg, in his answering affidavit to the above, alleged *inter alia* that he only became aware of the fact that the applicant had a licence from Government on the 8th March last.

After the rule *nisi* had been granted the Council offered to allow the applicant to remain until his licence had expired, but they made no tender to pay the costs of the application.

Mr. Searle was heard in support of the rule.

Mr. Schreiner, Q.C., for the respondents.

The Chief Justice said: For several years before the respondents obtained a grant of the land from the Government the applicant had occupied a portion of it for the purpose of quarrying granite.

As far back as October, 1891, the applicant informed the Mayor of the respondent Municipality that he had a lease from the Government.

This was not strictly correct, as he merely held a licence to take granite subject to revocation at a short notice, but the respondents had full notice that he claimed a right of occupation for quarrying purposes granted to him by the Government. The exact nature of that right they might have ascertained by simply asking the applicant for an inspection of his so-called lease, but instead of taking this obvious course, after receiving their grant, they took the high-handed one of ordering him to remove within three days, and threatening to arrest his workmen if he failed to comply with their order.

He informed them that before they received their grant he had received and paid for a licence to quarry granite for another year which had not yet expired, and as they did not withdraw either their order, or their threat, he applied for an interdict to a judge in chambers.

After the rule *nisi* had been granted the respondents offered to allow the applicant to remain until his licence was legally put an end to, but they did not tender the costs of the application. If the applicant was in the first instance entitled to an interdict, it is clear that they ought to have tendered to pay the costs as well as withdraw their threat.

In my opinion he was entitled to an interdict.

Even if the licence did not *per se* confer on the applicant that modified and exceptional form of

in re which a duly-executed lease confers on the lessee as against a subsequent purchaser, the respondents had sufficient notice, before they became owners of the land, that the applicant had certain rights as against the grantors of the land.

Having obtained their grant with notice of those rights the respondents cannot now claim to be released from them without giving the notice which the Government itself would have been bound to give to the applicant.

The respondents must therefore be ordered to pay the costs of the original application and of this motion.

Their lordships concurred.

[Applicant's Attorney, D. Tennant, jun.; Respondents' Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

LOGAN V. THE COLONIAL GOVERNMENT. { 1898.
MENT. { Mar. 18th.

Exception — Pleading — Public interest — Specific performance — Damages — Breach of contract.

It is no valid defence to an action for specific performance of a lawful contract and, in the alternative, for damages, that it was cancelled in the public interest.

If, however, the plea does not rely upon the public interest as a legal justification for the breach of contract, but mentions it merely to show the motive which influenced the defendant, such plea is not on that account bad in law.

Exceptions to such a plea overruled, inasmuch as the Court does not encourage unnecessary exceptions.

This case came on for argument on certain exceptions taken to the defendant's plea.

The plaintiff's declaration was in the following terms :

1. The plaintiff is James Douglas Logan, residing at Matjesfontein. The defendant James Sivewright, residing at Cape Town, is sued in his capacity as Commissioner of Crown Lands and Public Works, and as such representing the Railway Department of the Colonial Government.

2. On or about the 14th September, 1892, and at Cape Town, the plaintiff and one Charles Bletterman Elliott, the General Manager and Assistant Commissioner of Railways and Public Works, entered into a contract whereby the said Elliott in his aforesaid capacity gave and granted to the said Logan the sole and exclusive right of

supplying refreshments at the different refreshment-rooms then in existence, or which might thereafter be established, on the several lines of railway in this colony or elsewhere belonging to and under the control of the Colonial Government, together with the right of supplying refreshments on such trains as the said Government might authorise, for a period of ten years, reckoned from the date on which the refreshment-rooms then in existence should be handed over to the said Logan. The said right was granted upon certain terms and conditions and for certain considerations which will more fully appear from the said contract which is annexed hereunto (marked A) and which plaintiff craves may be considered as herein inserted. The right to continue the said contract for a further period of five years upon certain conditions was also granted, as will appear from the said contract. The said Elliott had full power and authority to act in regard to the said contract and to bind the Colonial Government thereby.

8. Thereafter on or about the 21st November, 1892, the said Elliott, acting as aforesaid on behalf of the Colonial Government, wrongfully and unlawfully gave notice that the said Government repudiated the said contract and considered the same cancelled. The plaintiff refused to accept the said notice.

4. The plaintiff was, and is able and willing, and has tendered, to perform his portion of the said contract, and is desirous of the same being duly performed and carried out ; and all things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to call upon the defendant, in his capacity as aforesaid, to carry out the said contract, or in the alternative, to pay to the plaintiff the sum of £50,000 as damages for breach of contract, but the defendant, in his aforesaid capacity, wrongfully and unlawfully refuses to abide by and perform the said contract or pay the said sum by way of damages.

Wherefore the plaintiff claims :

(a) That the defendant be ordered by this honourable Court to carry out and perform the said contract, the plaintiff hereby tendering to perform his portion thereof.

Or, in the alternative, in default of the said contract being carried out, that the defendant be ordered to pay the sum of £50,000 as damages.

(b) Such alternate relief as may seem meet.

(c) Costs of suit.

The defendant filed the following plea.

For a plea to the declaration the defendant says as follows :

1. As to the first paragraph of the declaration, the defendant says that as Commissioner aforesaid he administered the Cape Government Railways ; in regard to such administration and in the dis

charge generally of his duties as Commissioner he represents Her Majesty the Queen in her Colonial Government. Subject to the above, he admits the allegation in the said first paragraph.

2. As to the second paragraph, the defendant admits that on the 14th September, 1892, a contract was entered into between the plaintiff and the said Elliott, having reference to certain rights in regard to the supply of refreshments on the several lines of railway belonging to and under the control of the Colonial Government. He also admits that the said Elliott was authorised by the defendant to sign the said contract. For the terms, conditions, and stipulations of the said contract, the defendant refers this honourable Court to the original thereof when produced.

3. As to the third paragraph, the defendant says that after the execution of the contract as aforesaid, Her Majesty's Colonial Government, acting in the public interest, refused to be bound by the terms of the said contract and desired that the same should be considered as cancelled. This was notified to the plaintiff by the said Elliott, acting on behalf of the Government, on or about the 21st November aforesaid.

4. As to the fourth paragraph, he admits that the plaintiff has tendered to perform his portion of the said contract, and is desirous of having the same carried out. He admits also that he, as representing Her Majesty's Colonial Government, refuses to perform the said contract for the reason that it is undesirable in the public interests that the said contract should be carried out; also that he refuses to pay the sum of £50,000 by way of damages.

He denies that the plaintiff is entitled to call upon the defendant in this action to carry out the said contract, and he denies that the plaintiff has sustained damages by reason of the premises in the sum of £50,000. He asks leave to refer this honourable Court to such proof of damage, if any, as the plaintiff may adduce, and he prays that the Court may award the amount of such damages according to law.

To this plea the plaintiff took the following exceptions: For an exception to so much of defendant's plea as relates to the plaintiff's claim for specific performance of the contract referred to in the pleadings, the plaintiff says as follows:

1. The said plea is bad in law, and affords no defence to the said claim, by reason that the refusal of the defendant to perform the said contract and the denial in the said plea contained of the plaintiff's right to call upon the defendant to carry out and specifically perform the said contract are not founded upon any legal ground set forth in the said plea and justifying such refusal and denial.

2. The portions of the said plea to which the exception relates are:

(a) Paragraph 3 except the allegation of notice to the plaintiff by the said Elliott; (b) of paragraph 4 the following portions: (1) "For the reason that it is undesirable in the public interests that the said contract should be carried out," and (2) "he denies that the plaintiff is entitled to call upon the defendant in this action to carry out the said contract."

Wherefore he prays that the aforesaid portions of the said plea may be expunged with costs.

2. And for a further exception (should the above be overruled, but not otherwise), the plaintiff says that the portions of the said plea, referred to in the above exception, are vague and embarrassing to the plaintiff, in that the said plea does not disclose in what respects it is alleged to be undesirable in the public interests that the said contract should be carried out, or for what reason known to the law he (the plaintiff) is not entitled to call upon the defendant to carry out the said contract.

Wherefore he again prays that the aforesaid portions of the said plea may be expunged with costs.

Mr. Schreiner, Q.C. (with him Mr. Searle), was now heard in support of the exceptions, and contended that the plea disclosed no grounds for refusing specific performance. Non-legal reasons were only stated, and they should be struck out. The words "He (that is the defendant) admits also that he, as representing Her Majesty's Government, refuses to perform the said contract for the reason that it is undesirable in the public interests that it should be carried out" amounted to no defence to a claim for specific performance. No private individual could rely on such a plea, nor could the Government. He cited "*Bindr v. The Colonial Government*" (5 Juta, 284). He asked if it was competent for one in the position of the Commissioner of Crown Lands and Public Works, having entered solemnly into this contract, to break it just because he discovered that the contract did not jump with the public interests. The plea is a political one and bad in law.

The Solicitor-General, Mr. Maasdorp, Q.C. (with him Mr. Giddy and Mr. Webber), appeared for the Government. He was not called upon to reply to the argument on the exceptions, but he stated generally that the effect of the plea was that specific performance could not be decreed against the Sovereign, who was really the defendant.

Mr. Justice Buchanan: Are you instructed to say whether it was intended to lead evidence as to whether it was in the public interest that the contract was broken?

The Solicitor-General: We have not gone into the question so far. There is a sufficient answer upon the plea. We say that we appear here as representing the Queen in her Colonial Govern-

ment—which they admit—and that being so, the answer is sufficient.

The Chief Justice said: It is highly inconvenient to try a case by instalments, and it is equally undesirable to encourage unnecessary exceptions. The plea is somewhat inartistic, but it is not so bad as to be open to the exceptions taken to it.

The mistake which the plaintiff's counsel has made is to treat a statement showing the motive which influenced the defendant in breaking the contract as if it had been pleaded by way of legal justification for such breach.

I quite agree that it is no valid defence to an action for specific performance of a perfectly lawful contract and, in the alternative, for damages, that it was cancelled in the public interest.

The plea in the present case does not, as I understand it set up that defence. But it is urged that, inasmuch as the plea objects to specific performance, it ought to state special grounds of objection. The grounds must be gathered from the nature of the action, but this is not the stage at which they should be discussed. After the evidence has been taken and the whole case argued the Court will be in a position to decide whether specific performance should be decreed or whether damages will be sufficient compensation.

The exceptions must be overruled but as the plea is somewhat ambiguous the costs will abide the result.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buismann; Defendants' Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

(IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, (K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.) 1898.
Mar. 21st.

SHAW V. BATCHELOR.

Mr. Webber applied on behalf of defendant for removal of the trial of the suit between the parties from this Court to the Circuit Court to be held at Burgersdorp on the 18th April next.

The Court made the order, costs to be costs in the cause.

Ex parte BOLUS.

Mr. Schreiner, Q.C., moved on behalf

of petitioner for leave of absence for six months from his duties as one of the official liquidators of the Cape of Good Hope Bank on the grounds of ill-health and for the transaction of important private affairs.

The application was granted.

BLAKE AND OTHERS V. ROOS.

Mr. Buchanan moved to make absolute the rule nisi for the attachment of the share of inheritance of the respondent out of the estate of the late Jan Hendrik Olivier, and declaring the same executable in respect of three judgments of the Court of the Resident Magistrate for Albert.

The Court made the order.

PAYNE V. UTERMARCK. { 1898.
Mar. 21st.

Award—Rule of Court—Taxation of costs.

Mr. Webber moved to have the award of the arbitrators in the matter in dispute between the parties made a rule of Court. Under the award the sum of £85 was awarded to the applicant. This amount was paid by the respondent, but he objected to pay the costs as being exorbitant until they had been taxed.

Mr. Schreiner, Q.C., for the respondent, said there was no objection to the award being made a rule of Court, but the respondent had expressed his readiness and willingness to have the costs taxed, and it was wholly unnecessary to have the award made a rule of Court where both parties consented.

The Chief Justice said the decided cases applied to the present. Further, there was a clause in the deed a submission by which the parties consented to have the award made a rule of Court? As it had not been shown that it was wholly unnecessary that there should be taxation, the Court would make the award a rule of Court.

HELLABY V. HELLABY. { 1898.
Mar. 21st.

Mr. Sheil moved for an order declaring the defendant to have forfeited the benefits derived from his marriage in community with the plaintiff by reason of his malicious desertion. On the 12th October last the plaintiff obtained a decree of divorce by reason of the defendant's failure to obey the order of Court to restore to her her conjugal rights.

The Court, however, reserved for future argument the question whether a forfeiture could be declared for malicious desertion. The point was subsequently decided in the affirmative on the

2nd November, in the case of "Dawson v. Dawson" (2 C.T.L.R., 838). On the 12th January, 1892, the plaintiff bought some property in Claremont, of which she had not yet received transfer. She subsequently sold the property, and was now desirous of transferring it to the purchaser.

The Registrar of Deeds declined to allow transfer to be passed in her name, as the property had been bought prior to the dissolution of the marriage, and because the Court had not yet declared a forfeiture in the case of "Hellaby v. Hellaby."

The Registrar directed the attention of the Court to the fact that the attorneys in the present application were not the same attorneys who appeared on the record in the divorce proceedings.

The Court granted a further order declaring the defendant to have forfeited all rights under the marriage in community on condition that the Registrar was satisfied that the present application was moved by the attorney on the record of the previous proceedings.

SUPREME COURT.

(IN CHAMBERS.)

[Before Mr. Justice BUCHANAN { 1898.
and Mr. Justice UPINGTON, } Mar. 28th.
K.C.M.G.]

ADMISSIONS.

Ex parte HUTTON.

On the motion of Mr. Schreiner, Q.C., Mr. Herbert Beevor Hutton was admitted as a conveyancer. The oaths to be taken before the Resident Magistrate, King William's Town.

Ex parte DE KOCK.

On the application of Mr. Castens, Mr. Servaas de Kock was admitted as a translator in the English and Dutch languages. The oaths to be

taken before the Resident Magistrate, Prince Albert.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE CHARLES LLOYD.

Mr. Castens moved for an extension of time to 1st September next for the filing of accounts in the said estate by the executor testamentary thereof.

The Court granted the order.

Mr. Justice Buchanan observed that it would be well if applications of this nature were in the first instance submitted to the Master, as it was possible that he might have some facts which he desired to bring to the notice of the Court.

LLOYD V. LLOYD.

Mr. Castens, on behalf of petitioner, moved for leave to sue *in forma pauperis* in an action against her husband for a judicial separation, by reason of his cruelty to petitioner.

The matter was referred to counsel.

WASSERFALL V. WASSERFALL.

Mr. Sheil, on behalf of petitioner, moved for leave to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce.

The Court granted leave to sue by edictal citation, personal service if possible, if not, one publication in the "Hampshire Gazette," the summons to be returnable on the 21st May.

GRAHAM V. GRAHAM.

Mr. Maskew, on behalf of petitioner, moved for a rule *nisi*, requiring her husband to show cause why she should not be admitted to sue him *in forma pauperis* and by edictal citation for restitution of conjugal rights, failing which for divorce.

The Court granted leave to sue by edictal citation, personal service if possible, if not, one publication in the "Daily Telegraph," the rule to be returnable on the 31st May.

APPENDIX.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

RAWSTORNE V. VAN DER MERWE. { 1898.
Feb. 28rd.

Provisional sentence — Interest — Mortgage
bond.

Mr. Schreiner, Q.C., moved for provisional sentence for £79 11s., being the amount of interest from 7th September, 1889, to the 31st December, 1892, at 6 per cent. per annum, on a capital sum of £400, being the amount of a mortgage bond dated 9th September, 1885, together with £4 18s., premiums of fire assurance paid by plaintiff in terms of the bond, with costs.

The Court granted provisional sentence for £72, being the amount of interest due up to the 7th September, 1892, and also for £4 18s., fire assurance premiums, with costs, but refused to grant provisional sentence for the whole amount prayed for, being the sum due up to the date of summons, it being stipulated in the bond that interest was to be payable half-yearly only.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte VAN ZYL. { 1898.
Feb. 28th.

Insolvency — Rehabilitation — Application
refused.

When an insolvent, who had surrendered his estate seven years before the date of the application for his discharge, had framed

false schedules and had refused to render his trustee any assistance in looking after the live-stock and other assets of the estate, the Court refused to order his discharge but granted leave to apply again in three years.

Mr. Buchanan moved for the rehabilitation of the insolvent.

The estate was voluntarily surrendered on the 10th March, 1886, upon a writ of attachment issued at the instance of a first mortgagee.

The assets as per schedule (movables, £200, and the farm Vegelfontein, £500) were valued at £700, and the liabilities (exclusive of interest on bonds and other claims not filed) amounted to £1,644 6s. 8d., leaving a deficiency of £944 6s. 8d.

The trustee reported that subsequent to the surrender of the insolvent's estate large quantities of grain were found at the farm Zeekoewlei, which had not been brought up in the schedules. That just about the time of the insolvency the insolvent's son-in-law claimed and took possession of twenty horses which he took away with him.

That the insolvent ascribed his insolvency to the fact that he had sold his farm Vegelfontein to his brother, who undertook to adopt the mortgages thereon, but as no transfer had been passed the land remained in his (the insolvent's) name and upon being sued he was forced to surrender his estate.

The trustee further reported that the insolvent had rendered him no assistance and had refused to give any information about his estate or to assist in looking after the live-stock and other assets.

The insolvent was examined on oath before the Resident Magistrate of the district and admitted that after his wife's death he framed a false liquidation account. That he had not included the farm Zeekoewlei and other assets in his schedules, and that he had perjured himself in bringing up certain live-stock in his schedules which belonged to his son-in-law. The creditors did not appear to oppose the present application.

The Court refused to order the discharge, but granted leave to renew the application in three years.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinneé.]

DIGEST OF CASES.

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Act No. 9 of 1889—Lottery—Game of chance — Shooting match — Summons.		Ras v. Wiese	40
<i>A shooting match at which the competitors contribute to a fund from which prizes are awarded to the successful competitors is not a lottery in terms of section 3 of Act No. 9 of 1889.</i>		AGENT—Purchase of land—Bond—Payment to agent with principal's knowledge — Fraud — Liability — Myburgh v. Marais	47
<i>A contribution made to the fund on behalf of a competitor can be recovered from him by the person who made the advance.</i>		1. ANTE-NUPTIAL CONTRACT—Appointment of new trustee—No order— <i>Ex parte Melle and Wife</i>	7
<i>The fact that no money was actually paid into a separate fund by the plaintiff would be no bar to an action for money advanced on behalf of the defendant, where the plaintiff had supplied the prizes to the full value of the contributions, and the defendant had requested the plaintiff to make the contribution for him with full knowledge of all the circumstances.</i>		2. — Trustees—Life Policy—Application for leave to cede—No order made by Court— <i>In re Slater's ante-nuptial contract</i>	34
Moorcroft v. Stone	31	APPEAL—Verdict of jury—Question of law reserved—Theft—Evidence of crime—Continuous possession.	
Act 20 of 1856, section 8—Magistrate's jurisdiction—Title to land—Trespass.		<i>The question whether there is any evidence of the crime charged may be reserved by the judge presiding at a trial of a criminal case as a question of law for the consideration of the Supreme Court.</i>	
<i>A Resident Magistrate has no jurisdiction in an action for trespass wherein the bona-fide question in dispute is whether the plaintiff, as the registered owner, had legally obtained transfer of the land alleged to have been trespassed upon as against a third party who had given the defendant leave and licence to commit the alleged trespass, another action being at the time pending in the Supreme Court in which such third party sued the plaintiff to have the transfer set aside.</i>		<i>The credibility of the witnesses does not enter into the consideration of such a question for if any facts have been deposed to on behalf of the prosecution, from which a jury might justly infer that the crime charged had been committed by the prisoner, the verdict should not be disturbed.</i>	
		Regina v. Judelman	13
		AWARD—Rule of Court—Taxation of costs—Payne v. Utermark	110
		CONTRACT—Alleged breach—Sheep—Delivery — Damages — Costs — Appeal—Lipschitz v. Kunne	98
		2. — Services rendered — Remuneration — Action for — Wichura v. Delbridge	79
		CONTRACT OF SALE—Conditions—Breach—Damages—Louw & Co. v. Laubscher	65
		COSTS—Taxation—Rule of Court 315,	

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section 12—Review— <i>In re Steenkamp v. De Villiers and Others</i> ...	104	of any election for members of the Divisional Council in terms of Act 40 of 1889 he is functus officio and cannot direct the taking of further proceedings which might lead to a different result.	
CRIMINAL LIBEL—Act 48 of 1882—Innuendo—Exceptions—Special plea of justification—Public interest—Time and manner of publication.		Until the election for any district has taken place the Civil Commissioner may correct any mistakes he may have made in the preliminary proceedings, provided that he does not contravene any provision of the Act.	
Where, in a criminal prosecution for libel, the words alleged in the indictment to have been used by the defendant are capable of the meaning ascribed to them in the innuendo an exception to the indictment on the ground that the innuendo was not justified by the words used held to be bad.		A nomination paper signed by four persons entitled to vote for a district and by a fifth person in the name of a deceased registered voter may be treated by the Civil Commissioner as null and void, and if, by mistake, he has published the nomination of the candidate, he may revoke such publication and declare the only other candidate who had been duly nominated to be duly elected for such district.	
The alleged libel having been published by means of post-cards addressed to the person libelled and read by members of his family, Held, that a special plea of justification should state the fact or facts by reason of which it was for the public benefit that the matters charged should have been published in that particular manner, and that in the absence of such a statement, an exception to the plea was properly allowed, and evidence in support of the plea properly disallowed, at the trial.		The case of <i>Osterloh v. Civil Commissioner of Caledon</i> (2 Searle, 240) distinguished and followed.	
Held further, that if the plea had not been open to the exception it would have been the duty of the presiding judge to leave to the jury the question whether the time and manner of publication were such as to serve the public interest.		<i>Hitchcock v. Steytler—Roux v. Civil Commissioner of Britstown</i> ...	22
<i>Regina v. Hirsch</i> ...	92	EVIDENCE—Law-agent—Misconduct—Removal from list of enrolled agents—Act 20 of 1856, section 37—Review.	
DIVISIONAL COUNCIL—Election—Subsequent cancellation—Illegality—Civil Commissioner—Costs <i>de bonis propriis</i> —Divisional Council, Britstown v. Civil Commissioner, Britstown, and Roux ...	96	<i>R.</i> , a law-agent practising in the Resident Magistrate's Court for Caledon, was summoned on the 24th December, 1892, to show cause why his name should not be absolutely removed from the list of enrolled agents practising before that Court, on the grounds of his having in 1890 been convicted of fraud in the Transvaal, and sentenced to two years' imprisonment with hard labour.	
ELECTION FOR DIVISIONAL COUNCIL—Civil Commissioner—Nomination—Rectification of mistake—Act 40 of 1889.		At the hearing of the case a letter, purporting to have been written by the Assistant Registrar of the High Court, Pretoria, and enclosing a copy of the indictment upon which <i>R.</i>	
When once a Civil Commissioner has officially declared the final result			

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was convicted, and detailing the circumstances of his conviction and the subsequent quashing of the conviction, was read as evidence against R.

No certified copy of the record of the trial in the Transvaal was produced—the indictment was not certified, the Assistant Registrar's letter did not bear the seal of the High Court, nor was there any proof before the Court that the writer was the Assistant Registrar of the High Court.

R. recused the Magistrate on the grounds of animus, and objected to the proceedings as being inter alia informal, and refused to answer any questions.

R.'s name was ordered to be struck off the list.

Held, on review under Act 20 of 1856, section 37, that there was sufficient prima-facie evidence before the Resident Magistrate to justify him in calling upon R. to show cause, and that R.'s name had been properly struck off the list of enrolled agents.

ROOS v. Resident Magistrate of Caledon
EXCEPTION—Pleading—Public interest
 —Specific performance—Damages—
 Breach of contract.

1

It is no valid defence to an action for specific performance of a lawful contract and, in the alternative, for damages, that it was cancelled in the public interest.

If, however, the plea does not rely upon the public interest as a legal justification for the breach of contract, but mentions it merely to show the motive which influenced the defendant, such plea is not on that account bad in law.

Exceptions to such a plea overruled, inasmuch as the Court does not encourage unnecessary exceptions.

Logan v. Colonial Government. ... 108

EXECUTOR—Letters of administration—
 Domicile—Absence from Colony—
 Security—Removal of executor.

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Letters of administration should not be granted by the Master of the Supreme Court to any person who is absent from the Colony at the time of applying for the same.

An executor testamentary who is not only domiciled in the Colony but is actually here at the time of applying for letters of administration is entitled to obtain the same without any conditions.

If an executor testamentary is not domiciled here, but comes here for the purpose of applying for letters of administration, the Master should grant the same unconditionally if he is satisfied that such executor will reside within the jurisdiction until he has fully administered the testator's estate.

If, however, the Master is not so satisfied he ought to require security for the due administration of such estate.

When once letters of administration have been granted to any executor, whether testamentary, dative or assumed, he will not be removed from office owing to temporary absence from the Colony, if he is willing to remain in office, in the absence of proof that duties requiring performance have been left unperformed, or that some act of administration which cannot be done without his presence requires to be immediately done.

Upon a petition by persons appointed by will as executors together with a person resident in the Transvaal to restrain the Master from granting him letters of administration, the Court directed that, if such non-resident should apply in person, the Master should judge whether it is a case in which letters should be granted unconditionally or on condition of proper security being given, and that, if the applicant should not come into the Colony at all for the purpose of his application, the

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<i>Master should refuse to grant him letters.</i>		<i>that the measure of compensation was the difference between the market price of the shares when they were delivered and the price at which they were sold; but, the plaintiffs consenting, the damages were reduced to the amount of profits actually realised by the purchaser.</i>	
<i>In re Schoeman</i> 3		Trustees of Asbestos Company v. Hirsche and Others—Hirsche and Others v. Trustees of Asbestos Company 68	
FIRE POLICY —Payment—Interdict.		HIRE —Wagon—Loss—Act of God—Alleged negligence—Liability—Summons disclosing no cause of action—Exception sustained on appeal—Mbana and Others v. Zensile 100	
<i>The Court granted an interdict restraining a Fire Insurance Company from paying the amount of a fire policy to the insured, against whom allegations of fraud and of intention to abscond were made on affidavit, pending the appointment of a trustee in the deponent's insolvent estate, and an action to be instituted by him against the insured.</i>		IMPORTER —Licence—Malt—Act 38 of 1887, section 2—Contravention—Conviction—Appeal.	
<i>Alberts v. Kaplan</i> 35		<i>A person, who annually imports £1,200 of malt or other ingredients to be used in the manufacture of beer sold in this country, is liable to an importer's licence under Act 38 of 1887.</i>	
FRAUD —Illegality— <i>Ultra vires</i> —Colourable transaction—Directors of company—Reserved shares— <i>Culpa lata</i> —Winding-up Act, section 47—Damages—Misfeasance or breach of trust.		<i>The case of Regina v. Poppe (2 C.T.L.R., 393) commented upon and distinguished.</i>	
<i>A fraudulent or knowingly illegal contract entered into by directors of a company for the sale of certain reserved shares of the company cannot be relied upon by them as a justification for delivering such shares to the purchaser at a time when they had risen considerably in price above that at which they were sold.</i>		<i>Regina v. Ohlsson</i> 25	
<i>In estimating the damages sustained by the shareholders by reason of such delivery no presumption should be allowed in favour of the directors that but for their fraud or illegality the shares would not have risen.</i>		INSOLVENCY —Trustee—Removal—Ordinance 6 of 1843, section 52— <i>In re Estate of Redlinghuys</i> — <i>Ex parte Barry</i> 35	
<i>In an action brought by the trustees of a company on behalf of the shareholders against certain directors for their misfeasance in delivering shares then selling at 48s. 6d. each upon payment by the purchaser of only 20s. each, the defendants relied upon a prior contract of sale as a justification for such delivery.</i>		2. — Ordinance 6 of 1843, section 127—Will—Bequest—Execution—Theron v. Collett 54	
<i>Held, that, inasmuch as the contract of sale as understood by the defendants was illegal, and, as found by the Court, was moreover fraudulent, it afforded no defence to the action, and</i>		3. — Trustee appointed in Griqualand West—Application for confirmation—Act 39 of 1877, section 13— <i>Ex parte Pooley</i> —In the Insolvent Estate of Isabella S. O'Connell 64	
		4. — Rehabilitation—Application refused.	
		<i>Where an insolvent, who had surrendered his estate seven years before the date of the application for his discharge, had framed false</i>	

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<i>schedules; and had refused to render his trustee any assistance in looking after the live-stock and other assets of the estate, the Court refused to order his discharge but granted leave to apply again in three years.</i>	
<i>Ex parte Van Zyl ... (Appendix)</i>	
LICENCE TO QUARRY—Lease—Grantee with notice of incumbrance—Interdict—Costs.	
<i>The Government, having granted a quarry licence to C. to quarry granite upon certain Crown land, made a grant of the land to W., who thereupon ordered C. to remove from the land and threatened to arrest his workmen if he refused. It appeared that W. before receiving the grant was aware that C. had for several years been quarrying granite by permission of the Government and might have ascertained the exact nature of his rights by reference to him.</i>	
<i>Held, that, C. was entitled to an interdict restraining W. from carrying out his threat before the expiration of the year for which the licence had been granted.</i>	
Cane v. The Wynberg Municipality ...	106
MASTER AND SERVANT—Act 18 of 1873, section 2, sub-section 2, and section 9—Conviction quashed on review—Regina v. Cornelus Beukes ...	97
2. — Act 18 of 1873, section 2, sub-section 2—Conviction quashed on review—Regina v. Saronil and Dina Boomzailer ...	97
MUTUAL WILL—Adiation—Survivor—Vesting—Legacy— <i>Jus accrescendi</i> —Testator—Intention.	
<i>Husband and wife by a codicil to their mutual will bequeathed a farm, after the death of both of them, to their son "J." and made a further cumbrous provision, which the Court construed to mean, that in case another son should be born, he should take a half-share in the farm and "J." the other half.</i>	

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<i>After the execution of the codicil and before the death of either testator another son "L." was born. The testator died first and the surviving widow adiated. Thereafter the son "J." died, leaving two children (the plaintiffs). The surviving testatrix and "L." then transferred the whole farm to "R." who was aware of the contents of the codicil.</i>	
<i>Held, that, whether or not the jus accrescendi applied to the legacy, "J." had, before his death, acquired a vested reversionary interest in one half of the farm and that the plaintiffs, as his heirs, were entitled to have the transfer of their father's share to "R." set aside.</i>	
<i>Held further, that, inasmuch as the codicil amounted in substance to a legacy of the farm, after the surviving spouse's death, to both sons in equal shares, the presumption was that the testators did not intend the jus accrescendi to apply</i>	
Steenkamp v. De Villiers and Others ...	58
NATIVE TERRITORIES PENAL CODE—Act 24 of 1886, section 198—Theft of goats—Evidence of concert—Conviction sustained on appeal—Regina v. Jim and Others ...	16
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ORAL PROMISE — Suretyship — Undertaking to repay advances made to another—Evidence.	
<i>There is no rule in the law of the Colony, as there is in the English law, that an action cannot be brought upon an oral promise to answer for the debt of another, but the evidence of such a promise must be clear and conclusive.</i>	
<i>Equally clear evidence is required of a direct promise to repay advances to be made to another as the promisor's agent, although such a promise is not</i>	

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<i>required by English law to be in writing.</i>	
Korster v. Blake	27
PAUPER—Application for leave to sue— 125th Rule of Court—Rule nisi discharged— Watermeyer's Executrix v. Watermeyer	7
PAUPER SUIT—Reference to counsel— Appeal in forma pauperis—Defamation. <i>Where, upon the face of an application for leave to sue or defend in forma pauperis, it is clear to the Court that there is no cause of action or defence no reference will be made to counsel.</i> <i>Appeals from Circuit Courts may be instituted in forma pauperis, but the fact that judgment has been given against the petitioner would justify the Supreme Court in looking more closely into the petitioner's case than in an original suit.</i> <i>Where, upon the face of a motion for leave to appeal in forma pauperis against a judgment for the defendant given by a Circuit Court in an action for defamation it appeared that the alleged defamation consisted in the statement that petitioner had bewitched the defendant's daughter,</i> <i>Held, that, as the statement was not defamatory, there should be no reference to counsel.</i>	
Ex parte Du Flooy	11
PLEADING—Amendment—Waiver. <i>Where, on the hearing of exceptions to a declaration, the plaintiff is allowed there and then to amend his declaration and no objection is taken to such amendment being made without previous delivery to the defendant of a copy of the amended declaration, such amended declaration will be treated as having been duly filed, and no objection can afterwards be taken in respect of the non-delivery thereof to the defendant.</i>	
Logan v. Read and Ash	52

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PLEDGE—Sale—Delivery—Re-delivering—Execution creditor—Judicial attachment—Interpleader suit—Preference. <i>Where a transaction which in form is a sale is really intended to be a pledge the Court will, at the instance of the pledgor's creditors, treat it as a pledge with all its incidents.</i> <i>An insolvent executed a so-called "deed of sale" whereby he purported to sell certain goods to his father, for the amount of a debt due to the father, and the latter agreed that the sale should be considered as cancelled upon payment of the debt.</i> <i>Upon the execution of the deed of sale the goods were delivered to the father, but were afterwards allowed to remain in possession of the son as his own property.</i> <i>Held, in an interpleader suit between the father and an execution creditor of the son, at whose suit the goods in the possession of the son had been attached, that the attachment gave the creditor priority over the father.</i> <i>The cases of Keyter v. Barry's Executor (Buch. 1879, p. 175) and Quirk's Trustees v. Assignees of Liddle (3 Juta, 322) commented upon.</i>	
Hofmeyr v. Gous	98
POUNDS ACT, 1892—Sections 36 and 75—Trespass—Damages—Redress at common law. <i>A person whose land has been trespassed upon by the cattle of another is entitled to redress at common law, where he has never impounded such cattle at all or where, having impounded such cattle, he has neither claimed damages under the 32nd or 33rd section of the Pounds Act, 1892, nor claimed assessment of damages under the 32nd section.</i>	
Thompson v. Schietekat	46
POUNDS—Act No. 15 of 1892—Care-taker—Trespass money—Tender of—Illegal impounding—Damages.	

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<i>The plaintiff's cattle having been taken to the defendants' kraal for the purpose of being sent to the pound for trespass on the defendants' land, the plaintiff not finding the defendants at the kraal offered to the herd in charge the amount of trespass money lawfully payable, which the herd refused as insufficient.</i>	
<i>On the defendants' return they were informed of the tender but impounded the cattle.</i>	
<i>Held, that even if the herd was not a "caretaker" in terms of the 27th section of Act 15 of 1892, the defendants were not justified in impounding the cattle without first offering to the plaintiff to accept the tender and deliver back the cattle.</i>	
<i>On an appeal against a judgment for damages for a deliberate delict or tort the Court does not scrutinize the evidence in support of damages so closely as in actions for breach of contract involving no turpitude on the defendants' part.</i>	
Stuurman and Twaisha v. Van Rooyen	32
POUND ORDINANCE—Trespass—Rams—Penalty.	
<i>The owner of more than one ram found trespassing on the property of any other person is liable to the penalty provided by the 52nd section of Ordinance 16 of 1847, in respect of each such ram.</i>	
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PREFERENCE — Judicial attachment —	
<i>Pignus judiciale—Pledge—Delivery — Re-delivering — Notarial bond— Judgment creditor and debtor.</i>	
<i>Judicial attachment of a judgment debtor's goods confers a preference thereon over a creditor, to whom the goods had been pledged by such debtor, but who, before such attachment, had re-delivered the goods to the debtor, and the fact that the pledge had been effected by means of a duly-registered notarial bond does not strengthen the claim of the bond-</i>	

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<i>holder as against the judgment creditor's judicial lien.</i>	
Kearns, Assignee of Bydell and Uys v. Cole ...	82
PRINCIPAL AND AGENT—Account—Summons in Magistrate's Court—Exception — Obligation to explain deficiency.	
<i>A summons in a Magistrate's Court alleged in substance, although in in-artistic language, that the defendant, as manager of the plaintiff's business at L., had accepted as correct certain stock-lists of goods supplied by the plaintiff to and found by him in the place of business, and that a comparison of these lists with the defendant's accounts of goods sold showed a certain deficiency unaccounted for.</i>	
<i>Held, that, in an action brought for the amount of the deficiency, an exception to the summons, that it disclosed no ground of action inasmuch as it did not allege that the loss was due to fraud or carelessness, had been properly overruled by the Magistrate.</i>	
<i>Assuming the statements in the summons to be correct, the obligation to explain how the deficiency occurred lay upon the defendant as the person entrusted with the custody of the goods and the management of the business.</i>	
<i>Failing such explanation the defendant held liable to account for and pay the deficiency.</i>	
Biddulph v. Yates ...	29
PRIVY COUNCIL — Appeal — Costs — Security—Trustees, Orange River Asbestos Company v. Hirsche and Others ...	102
PROVISIONAL SENTENCE — Mortgage bond — Documentary evidence.	
<i>To a claim for provisional sentence on the balance of a mortgage bond the defendant objected that the plaintiff was not entitled to recover such balance until the defendant had received transfer of a piece of land</i>	

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<i>alleged to have been purchased by him in addition to the land transferred and mortgaged.</i>	
<i>The declarations of purchaser and seller, and the deed of transfer, stated that £200 was the price of the land actually transferred and did not mention the additional piece of land.</i>	
<i>Held, that the defendant's unsupported allegation that such additional land had been purchased should not outweigh the documentary evidence, and that provisional sentence should be granted.</i>	
Haupt v. Korsten	88
2. — Promissory note—Van der Veen v. Le Roux and Another...	50
3. — Promissory notes — Defence—Payment — Evidence — Fagan v. Gous	62
4. — Interest — Mortgage bond — Rawstorne v. Van der Merwe (Appendix)	
RAILWAY—Expropriation— <i>Mala fides</i> —Interdict — Alienation of expropriated land—Transfer.	
<i>By agreement between a railway company and a contractor it was stipulated that the company should secure as much land as could be acquired under its Act and transfer to the contractor or his order, upon the completion of the contract, all land not actually to be used by the company.</i>	
<i>In pursuance of this stipulation the contractor, as the company's agent, acquired more land from the War Department than was actually required for railway purposes and, according to the evidence given for the War Department, undertook with the department that if the Act should be passed only buildings which are easily removable would be erected on the land.</i>	
<i>The deed of transfer of the land to the company recited that the land had been expropriated for railway purposes but contained no condition that the land was not to be alienated.</i>	

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<i>Upon the completion of the railway, the company proposed to transfer portion of the land to the contractor. Held, that as there was prima-facie evidence that the expropriation of such portion had been made for sinister and ulterior purposes the War Department was entitled to an interdict restraining the transfer with leave to the contractor to apply to set it aside.</i>	
<i>The Company also proposed to transfer another portion of the land to a purchaser, alleging that it had been sold in order to enable the payment of a loan which had previously been raised on mortgage of the land for the purpose of paying the compensation awarded by arbitrators to the department in respect of the expropriation of the land.</i>	
<i>Held, that the question whether the transfer should be interdicted must be tried by action to which the purchaser and the mortgagees should be parties, but pending such an action and in the absence of proof that the purchaser would be prejudiced by the delay, the Court granted a temporary interdict restraining the transfer.</i>	
Clayton, N.O. v. Metropolitan and Suburban Railway Company ...	8
REGISTERED CONDITION—Interpretation of—Sale of meal—Restraint on.	
<i>A mill property having been sold and transferred on condition that the purchaser shall not, either directly or indirectly, sell meal to anyone resident in the P. Municipality,</i>	
<i>Held, that a lessee from the purchaser was not prohibited by the condition from selling wheat to his customers within the P. Municipality, they being at liberty to have it ground elsewhere, and the price of the wheat being the same whether it be ground at such mill or taken away without being ground there.</i>	
Van Niekerk v. Blake and Schwartz ...	37

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Registration of title should not be ordered under Act 28 of 1881 unless the petition discloses prima-facie proof that the petitioner had by prescription, contract or otherwise acquired the just and lawful right to the ownership of the land sought to be registered.

On a petition stating that the petitioner's predecessors in title had purchased from W. certain plots of ground bounded on one side by a passage to the use of which the purchasers were to be entitled, that the plots had been duly transferred to such purchasers, and that the petitioner was now the sole owner of these lots and no longer required the passage as such.

Held, that, the presumption was that W. intended to reserve the ownership in the land beneath the passage to himself and that, in the absence of any proof to rebut that presumption, there was no prima-facie case to entitle the petitioner to registration of such land in his own name.

Bank of Africa v. Daniel ... 103

Sale—Pact—Servitude—Registration—Notice—Prohibition against selling liquor on land sold—Interdict.

An agreement superadded to a contract of sale of land that the purchaser shall not allow the sale of intoxicating liquors on the land without the permission of the vendor is binding upon the executor of the purchaser.

Where such an agreement has been introduced as a mere pact in favour of the vendor personally it would not be binding upon subsequent bona-fide purchasers without notice even although duly registered; but secus where the agreement constituted a servitude in favour of the vendor as the owner of another tenement, in which case registration would be sufficient notice.

Interdict granted restraining the exe-

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cutrix of the purchaser from selling intoxicating liquors on the land sold without proof of pecuniary damage to the vendor.

Consistory Dutch Reformed Church, Steytlerville v. Bowman ... 85

SHARES—Brokerage—Alleged partnership—Action for sums paid in error—Twycross & Co. v. Evans ... 80

SLANDER—Action—Damages—Murphy v. Creagh ... 42

SPECIAL DAMAGES—Specific performance—Declaration—Amendment—Pleading—Evidence—Sale of land—Breach of contract—Loss of profits—Interest—Wilful or fraudulent refusal to perform contract.

As a general rule, subject to certain specific exceptions, a plaintiff suing for specific performance of a contract of sale is not entitled, in addition thereto, to claim damages in respect of the profit which he would have made if the thing or land sold had been delivered or transferred in due time.

In an action for damages for breach of contract evidence is not admissible of any damages, which the law would not imply from such breach, unless the declaration contains an averment of the special damages sustained, or of such facts as would amount to a notification to the defendant that the evidence would be tendered.

Evidence of loss to the plaintiff of the use of the purchase price paid by him in advance held to be inadmissible in the absence of any averment of such loss, but it appearing that the defendant would not be prejudiced by the insertion of such an averment, the Court authorised an amendment of the declaration so as to enable the plaintiff to claim interest on the money so paid in advance.

Philip v. The Metropolitan and Suburban Railway Company (Limited) ... 56

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SUPERANNUATED JUDGMENT—Revivor— Practice — Summons — Notice of motion—Magistrate's Court. <i>It is no valid objection to a motion in a Magistrate's Court for the revivor of a superannuated judgment of such Court that the defendant has been brought into court by means of a notice of motion, duly served, instead of a formal summons.</i>	
De Beer v. Rose	45
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WINDING-UP—Insolvency—Call—Proof of debt — Contributory — Account and plan of distribution—Surplus— Confirmation of account—Discharge of insolvent—Personal liability of trustee. <i>The liquidators of a company wound up under the Winding-up Act of 1868 may place upon the list of contributories the name of a trustee of an insolvent shareholder, and a call duly ordered upon such contri- butory amounts to a judgment which may be proved against the insolvent estate. The insolvent is not entitled to re- ceive any surplus awarded to him by the plan of distribution until he has received his discharge, and in the meantime it is competent for the creditors to prove their claims subject to the provisions of the 37th section of the Insolvent Ordinance. An account and plan of distribution awarding such surplus to the in- solvent having been confirmed by the Court, and no proof of debt having been filed by the liquidators, the trustee in good faith and in the belief that the company, which had not then been ordered to be wound up, was a</i>	

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<i>sound concern, paid a portion of such a surplus to the insolvent. Held, that the trustee was not per- sonally liable, at the suit of the liquidators, to refund the amount so paid. Distinction between trustees and exe- cutors not providing for any con- tinuing liability of estates respec- tively administered by them ex- plained.</i>	
Liquidators of Union Bank v. King's Trustee	89
WINDING-UP ACT OF 1868, SECTION 47— Companies' Act, 1892, sections 209 and 149 — Directors — Breach of trust—Liquidators. <i>At a meeting of shareholders of a company for the administration of the estates of deceased persons and other trust estates it was resolved that the company be voluntarily wound up, and two of the directors were ap- pointed liquidators. A shareholder, who was not repre- sented at the meeting, now applied for a compulsory winding-up on the ground that the two liquidators had, with the other directors, been guilty of a breach of trust in speculating in gold-mining shares with the assets of the company and would not be fit and proper persons to thoroughly investigate the affairs of the com- pany. Held, that, inasmuch as the trust deed did not authorise the directors to speculate in gold shares, and the liquidators had not satisfied the Court that they voted in the minority when the speculations were entered into, the order for a compulsory winding-up ought to be made in order that independent liquidators might be appointed by the Court.</i>	
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REPORTS OF ALL CASES
DECIDED
IN THE SUPREME COURT
OF THE
CAPE OF GOOD HOPE,

DURING THE MONTHS OF APRIL, MAY, AND JUNE, 1893.

(WITH TABLE OF CASES AND DIGEST.)

REPORTED BY

J. D. SHEIL,

**OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE
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CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT.

(IN CHAMBERS.)

[Before the Chief Justice (Sir J. H. DE
VILLIERS, K.C.M.G.)]

SHAW V. BATCHELOR. { 1898.
April 7th.

Practice—Discovery—Inspection of documents—Rule of Court 333 (b).

On the 21st March last this suit (an action for damages for breach of contract) was by consent ordered to be removed for trial to the Circuit Court to be held at Burgersdorp on the 8th instant.

On the 23rd March the defendant was ordered to make discovery in terms of Rule 333 (B) of all documents in his possession or power relating to any matters in question in the said suit.

The defendant in reply did make a certain discovery, and subsequently an amended discovery, wherein he declined to allow the plaintiff the inspection of any documents which had passed, or formed part of the communications, between the defendant and one Dr. Young referred to in the defendant's plea on the alleged grounds:

1. That the same related exclusively to and supported the case for the defence, and were intended to be used by the defendant in evidence, and

2. That the same did not impeach the defence or form or support the plaintiff's case.

The plaintiff now alleged that according to reliable information in his possession the said documents would materially support his case if produced for inspection, and that they ought to be before the Court to enable substantial justice to be done as between the parties, the more so as the defendant had in his plea made the communications which had passed between himself and Dr. Young part of the *res gestae*.

Further, that from the said discoveries were omitted certain letters and a document of

which the plaintiff had knowledge, and although he had brought the fact of the said omission to the defendant's notice the same remained unrectified.

That the said lastmentioned letters and document formed part of certain communications which had passed between the defendant and Dr. Young in connection with matters in question in the action.

That due demand for an inspection of the said papers had been made upon the defendant by the plaintiff.

The plaintiff prayed the Court:

1. To order the production by the defendant upon oath at the hearing of the said suit of all and every the communications whether in the shape of letters, telegrams, or documents which had passed between the defendant and Dr. Young, whether direct from or to him, to or from Dr. Young, or passing through the intervention of Mr. Attorney Schweitzer, of Burgersdorp, or any one else.

2. To order the defendant to give to the plaintiff an immediate inspection of all the said letters, telegrams, and documents

In answer to the above allegations, a telegram was read from defendant's attorney, in which he alleged that the defendant had duly discovered all letters and documents in his possession relating to the case, that two of the letters referred to by the plaintiff could not be produced, as they were not in his possession, and that the deed of partnership entered into between himself and Dr. Young was not relevant.

Mr. Schreiner, Q.C., was heard in support of the application. He referred to the 333rd Rule of Court and to "*Mylebrest v. European Diamond-mining Company*" (2 App. Cas., 78).

Mr. Shell, for the defendant, contended that as the *forum* had been changed by the order of the 23rd March application should be made to the judge presiding at the Circuit Court, Burgersdorp, and not to the Supreme Court. The deed of partnership existing between the defendant and Dr. Young was clearly irrelevant.

The Court ordered the defendant to forthwith, upon being served with this order, produce for the inspection of the plaintiff's local attorney at

Burgherdom such of the documents mentioned in his affidavit of discovery, whether originals or copies (save and except the deed of partnership between Young and Batchelor), as are in his possession or power, and to permit such attorney to take copies thereof. The costs of this application to be costain the cause.

[Applicant's Attorney, G. Montgomery Walker;
Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. DIRK NERO. { 1898.
Apr. 12th.

Masters and servants—Act 18 of 1873, section 2, sub-section 4—Alleged contravention—Conviction quashed on review.

The Chief Justice said this case came before him as judge of the week from the Special Justice of the Peace for Garies (Namaqualand). Prisoner was charged with contravening clause 4, section 2 of Act 18, 1873, in absenting himself from his master's service on 23rd January last. He was fined 5s. or one week's hard labour.

The Chief Justice said if the prisoner was guilty at all, he was guilty of contravening the first and not the second sub-section of section 2 of the Act. No time was stipulated for his entering service, and therefore it was doubtful whether even the first sub-section would apply. Moreover, the prosecutor had agreed to waive his right to the prisoner's service if the money advanced to prisoner was repaid on a certain date. The money was not repaid on that particular day, but it was afterwards paid and accepted by prosecutor's wife. The conviction must therefore be quashed.

PROVISIONAL ROLL.

JONES V. NEWMAN. { 1898.
Apr. 12th.

Mr. Jones moved for provisional sentence upon a mortgage bond for £490 18s. 6d.
(Granted.)

STEPHAN BEOS. V. MYBURGH.

Mr. Juta moved for provisional sentence upon two promissory notes made by defendant in favour of plaintiff, one for £22 and one for £66.

The Court granted provisional sentence, less £20 paid on account.

BETLEVELD V. VAN DEN HEEVER.

Mr. Watermeyer applied for the final adjudication of defendant's estate.

Granted.

BOOYSEN V. VAN ZYL. { 1898.
Apr. 12th.

Provisional sentence—Promissory note—
Liquidity.

Mr. Juta moved for provisional sentence on two promissory notes, the first for the sum of £162, less £96 10s. paid on account, and the second for £170 10s., both bearing date August 26, 1892, and payable on February 1, 1893, at Elands Kloof, in the district of Richmond, made and signed by the defendant to and in favour of the plaintiff or order, together with interest thereon from the due date at 6 per cent. per annum, of which notes the plaintiff was now the legal holder, and which not having been paid when due were duly presented at the place where the same were made payable, and were dishonoured.

The notes were given for stock purchased by the defendant from the plaintiff.

The defendant filed an affidavit in which he alleged, *inter alia*, that it was distinctly agreed between the plaintiff and himself that the one note of £162 should, when it fell due on 1st February, 1893, be renewed from time to time until the expiration of eighteen months, each renewal to be for four months, so that the plaintiff could use it if he wanted so to do.

During that period he (defendant) had to pay interest and could pay off so much as he found convenient.

For that reason he hurriedly wrote at the foot of the £162 note the following: *If this note is not paid on due date I promise to pay interest to be named for a time to be fixed.*

That there was hardly more room to write the whole agreement on the bill, and being at the time on intimate terms with the plaintiff and trusting to his sincerity he (defendant) only wrote the few lines (as above).

Defendant attached a statement rendered to the plaintiff's agent showing a balance due on the note of £170 10s. amounting to £18 18s. 6d., which

sum had been tendered to the plaintiff and refused.

That with regard to the note of £162 defendant was still willing to renew it with the plaintiff every four months until the eighteen months had expired.

That on the 20th February last he was laid up in Richmond, when the plaintiff came to see him about the two notes, and after conversation they agreed that the defendant should make out his counter-claim on the £170 10s. note. That whatever was due defendant should give a note for, and that as for the £162 note, that they should go to Graaff-Reinet the day following to discount a renewal thereof in the bank, but that to his surprise he (defendant) received a letter from his (plaintiff's) agent about twenty minutes later demanding security or settlement.

Affidavits from several farmers, to whom the plaintiff had sold stock at a credit of eighteen months, were also filed.

Mr. Schreiner, Q.C., appeared for the defendant and opposed provisional sentence being granted on the note for £162, as it was clearly not a liquid document on which provisional sentence should be granted.

It contained a condition as to payment of interest at a rate to be named and for a time to be fixed.

That condition alone deprived the note of its liquidity, apart from the collateral agreement which had been entered into at the time of signing the note.

As to the note for £170 10s. provisional sentence would not be granted, as a difference of £80 1s. 6d. between the amount admitted, namely £96 10s. plus the tender, £18 18s. 6d., and the amount of the note was in dispute, and the rights of the parties could not be decided on a claim for provisional sentence.

Mr. Juta objected to any evidence being led which tended to vary the contract as it appeared on the face of the promissory note, and contended that the question of the interest to be charged had nothing to do with the note as it stood, and upon which the plaintiff was entitled to provisional sentence.

The Chief Justice said if the collateral agreement deposed to by defendant was really made, it would, in his lordship's opinion, afford a valid defence to defendant as against the claim for provisional sentence. But this collateral agreement must be as clearly proved as the agreement itself upon which plaintiff was suing. Defendant relied entirely upon oral communications which took place between the parties at the time the note was drawn, and he said the full collateral agreement was not written out because there was no time and no space on the note. But there was space to add the words "for a period of eighteen

months" instead of using the words "for a time to be fixed." As his lordship understood the last portion of this promissory note, it was a condition inserted in favour of the creditor. When the note fell due he might avail himself of the condition, or he might refuse to do so. In the present case he had not availed himself of it, and plaintiff was entitled to claim the amount with interest from 1st February, and provisional sentence would therefore be granted, less £96 10s.

Mr. Justice Buchanan said if the defence was to be availed of by defendant, it should have been taken at the time the note became due, or at a reasonable time thereafter.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorney, Paul de Villiers.]

STEVENS AND CO. V. VAN STRAATEN { 1898.
AND ANOTHER. } Apr. 12th.

Mr. Buchanan moved for provisional sentence on a promissory note for £85 4s. 6d., for value received.

Granted.

MIDLAND AGENCY AND TRUST CO. V. BURGESS.

Mr. Buchanan moved for provisional sentence on a mortgage bond for £75, less £80 paid on account. He also asked that the property be declared executable, and under rule 829 for £8 6s. 6d., being the premium of fire insurance on the property.

Granted.

TAIT V. WINTERBACH.

Mr. Juta moved for provisional sentence on a bond for £1,150, with interest. The bond was now due by reason of non-payment of interest. He asked that the property be declared executable.

Granted.

ALFORD AND WILLS V. DU PREEZ AND ANOTHER.

Mr. Watermeyer moved for provisional sentence for £185 9s. 6d. due on a promissory note.

Granted.

KOSSUTH'S EXECUTRIX V. LE SUEUR.

Mr. Schreiner, Q.C., for plaintiff, moved for provisional sentence for £558, money duly lent and advanced to defendant. Le Sueur had been placed under curatorship, and the plaintiff was willing to accept £166 in full, being the amount traced to him by his curator, Mr. Gibson.

Mr. Juta, for defendant, contended that the books ought to be produced to show to whom the alleged payments had been made.

The Chief Justice said Mr. Gibson as curator of this lunatic admitted he had drawn £166 19s. at all events from Kossuth. For that amount provisional sentence would be granted with costs

VORSTER V. GOLDSBY.

Mr. Sheil moved for judgment under rule 329 for £46 15s., being the purchase price of an erf in Philip's Town.

Granted.

VAN NOORDEN V. WIID.

Mr. Currey moved for judgment under rule 329 for the sum of £187 16s. 2d.

Granted.

ADMISSIONS.

Ex parte WRIGHT.

Mr. Sheil moved that Mr. Louis Antonie Wright be admitted as an attorney and notary, the oath to be taken before the Resident Magistrate at King William's Town.

Order granted

Ex parte ALING.

Mr. Sheil moved that Mr. Johannes E. B. Aling be admitted as an attorney of the Supreme Court
Mr. Aling took the oath, and was duly admitted.

REHABILITATIONS.

On motion from the bar, James Parker was granted his [rehabilitation; Christoffel J. A. van der Merwe's application was refused, leave being granted to apply again twelve months hence; while in the estate of A. J. Louw the Court called for an explanation of the deficiency in the assets, leave being granted to apply again on the first day of next term.

VAN DEN HEEVER V. THE DEPUTY SHERIFF FOR ALBERT AND BEYLEVELD. { 1898.
Apr. 12th.

Deputy Sheriff—Attachment—Rights of pledgee—Interdict.

This was the return day of a rule nisi (extended by consent from 16th February), granted on the 3rd February last, restraining the Deputy Sheriff for Albert from selling a certain cart attached by him in execution, pending an action to be brought

by applicant for restitution of the said cart or for payment of its value. The facts upon which the rule nisi was granted are as follows:

On the 8th October, 1892, one Gert Johannes van den Heever pledged to the applicant for a debt a certain Cape cart, and delivered the same to his custody.

The cart remained in applicant's custody until the 24th January, 1893, when the Deputy Sheriff for Albert, acting at the instance of one Willem Beyleveld, who had obtained a judgment against the said Gert Johannes van den Heever in the Circuit Court, entered on the private premises of the applicant at Burgersdorp, and without his authority and knowledge, as the applicant alleged, attached and removed the said cart.

The Deputy Sheriff refused to return the cart, and advertised the same for public sale on the 7th February.

The applicant alleged that he was in imminent danger of losing the entire benefit of his pledge through the conduct of the Deputy Sheriff, and prayed for an order restraining him and Beyleveld from selling the said cart, or taking any steps to the detriment of applicant as, the legal pledgee thereof, or parting with the same to anyone other than the applicant pending an action to be brought by applicant to establish his right to have and retain the said cart until the debt for which it was pledged had been paid.

Upon these facts the Court granted a rule nisi.

Mr. Juta now moved that the rule be made absolute.

Mr. Schreiner, Q.C., opposed, and read the affidavit of the Deputy Sheriff, in which he alleged, *inter alia*, that in his capacity as Deputy Sheriff for Albert he received a writ of execution against one Gert van den Heever, at the instance of Wm. Hendrik Beyleveld, on the 23rd January, 1893.

That he proceeded on the 24th January, 1893, to the defendant's (Gert van den Heever) farm to execute the same

That he asked Gert van den Heever to pay the amount stated in the writ, and on his stating his inability to pay the same, deponent asked him to point out sufficient property to attach in satisfaction of the writ.

That the said Gert van den Heever thereupon said that he had nothing, and that all the livestock and property on the farm belonged to his wife, and that his own estate had been surrendered as insolvent.

That he (the Deputy Sheriff) thereupon asked him how he could surrender his estate if he had nothing, to which he replied that he had handed over all his property, viz., one plough, ten bags of lime, and one Cape cart to Mr. J. C. van den Heever (the present applicant), of Burgersdorp, his attorney, for the benefit of his creditors.

That deponent thereupon asked him if his attorney had any lien on the said articles for costs or otherwise. He replied no, that he had merely given them over for the benefit of his creditors, and had instructed his said attorney that if the creditors would not accept the things, then he (Attorney Van den Heever) was to surrender his (Gert van den Heever) estate as insolvent. He also added that his schedules had been made out as long back as November last.

That he (the Deputy Sheriff) then returned to Burgerstad and reported the foregoing to plaintiff's attorney, who stated that if the cart and other articles were delivered to Gert van den Heever's attorney in the manner stated they could be attached. That he then called to see Mr. Attorney Van den Heever at his office, but was told he had gone to Venterstad, whereupon he procured the services of one Frans Kruger, who knew the cart pointed out to him. That on arriving opposite to Mr. J. C. van den Heever's residence, the yard gate being open, Mr. Kruger pointed out, standing in the yard, the cart in question, which he attached on the plaintiff's attorney's instructions, and removed and placed in the wagonhouse of Mr. W. Russell, which he hired for the purpose, and he also affixed a label to the cart stating that it was attached under a writ of execution in the case *Beyleveld v. Gert van den Heever*. That on the following morning Mr. Attorney J. C. van den Heever, without reference to him (the Deputy Sheriff) or without making any claim to him for the cart, removed

it to be removed, from Mr. Russell's yard back to his own. That about ten a.m. that morning, January 25, applicant called at his (the Deputy Sheriff's) office and told him that he had retaken the cart; that he had a lien of £80 upon it, but was willing to give security to produce it when required. That he (the Deputy Sheriff) told him that before he could consider any question of security the cart must be re-delivered to him as applicant's action in removing it in the way in which he did was subversive of law. That he also wired to the High Sheriff what had occurred, and that he (the High Sheriff) confirmed his (the Deputy Sheriff's) statement which he also made known to Mr. Attorney Van den Heever. That he (Attorney Van den Heever) eventually returned the cart into the Deputy Sheriff's possession on Saturday afternoon, January 28, 1898, and on the following Monday he filed with deponent an affidavit, which was dated January 28, 1898, upon which affidavit, after consulting plaintiff's attorney, he (the Deputy Sheriff) delivered the cart to applicant on Tuesday morning, January 31. That when he (the said applicant) applied to the honourable the Supreme Court on Friday, February 8 (that being the date of the order), for an interdict, he well

knew that the said cart had been in his possession since Tuesday, January 31, 1898.

Several other affidavits of a very contradictory nature were also read, and after hearing counsel, the Court delivered judgment.

The Chief Justice said an initial mistake had been made by the Deputy Sheriff, and it appeared that no notice was given to Van den Heever in respect of the attachment. It was said, on the other hand, that Van den Heever was not at his residence at the time of the attachment, but no notice was given to anyone left in charge by Van den Heever, and that initial mistake justified Van den Heever in asking the Court to restrain the Deputy Sheriff from selling the cart. If the fact that he had taken back the cart would have had any material effect on the Court, it was the clear and bounden duty of Van den Heever to have brought it to the notice of the Court; but everything depended upon the question whether at the time the application was made the cart had been delivered back by the Sheriff. If it had been re-delivered by the Sheriff there was no necessity for all the statements as to what took place, because the fact that it had been taken back could not affect the issue. So that, after all, everything depended upon the question whether or not on January 31, as stated by the Sheriff, the cart had been delivered back by him. Well, his lordship was of opinion that the Deputy Sheriff was mistaken. He was mistaken in the dates. All the probabilities were in favour of Van den Heever. The terms in which the affidavits were drawn fully confirmed the statement of Van den Heever; besides, it was extremely improbable that Van den Heever would have continued this application if he had already the cart in his possession. It was extremely improbable that he would not at once have withdrawn the application, because he would naturally say, "I have got my cart." Besides, look at the conduct of the Sheriff. His conduct showed that he could not himself at that time have believed that the cart had been delivered, because he said nothing about it. One would have thought that his immediate answer would have been, "The cart has already been delivered, and why serve this interdict upon me?" Under all the circumstances, his lordship was of opinion that the rule should be made absolute. He did not impute wilful perjury to the Deputy Sheriff or his witnesses; they were mistaken. Costs to be paid by respondents.

Their lordships concurred.

[Applicant's Attorney, G. Montgomery Walker; Respondents' Attorneys, Messrs. Fairbridge & Arderne.]

CONTAT V. WOOLF. { 1898.
Apr. 12th.

On the motion of Mr. Schreiner, Q.C., the Court made absolute the rule nisi interdicting the respondent from disposing of a certain agreement of lease of coal-mining rights in the district of Albert, as well as the mining plant and tools in connection therewith, pending an action for a declaration of rights and for damages.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

LLOYD V. LLOYD. { 1898.
Apr. 18th.

Mr. Oastens, on behalf of petitioner, applied for a rule nisi requiring her husband to show cause why she should not be admitted to sue him *in forma pauperis* in an action for a judicial separation by reason of his alleged misconduct.

The Court granted the order, the rule to be returnable on 1st May.

Ex parte VILJOEN.

Mr. Juta, on behalf of petitioner, moved to make absolute the rule nisi, issued under the Titles Registration and Derelict Lands Act, for transfer to petitioner of certain two erven marked Nos. 249 and 250, situated at Venterstadt, at present registered in the name of Wm. G. Stuart. There was, he added, no representative of the estate in this country.

The Court made the order.

BASSON V. SCHICKELING. { 1898.
Apr. 18th.

Provisional sentence—Acknowledgment of debt—Plaintiff ordered to go into the principal case—Rules of Court 25 and 330. *S. sued B, provisionally on an acknowledgment of debt.*

Provisional sentence was refused and the plaintiff ordered to go into the principal case.

No further steps were taken by S.

Thereafter B. applied for leave to sign final

judgment against S. by reason of his failure to proceed with his action.

The Court refused the application with costs.

Mr. Schreiner, Q.C., for the applicant (defendant in the action), applied for leave to sign judgment against the plaintiff (the present respondent) by reason of his failure to proceed with his action, and for an order finally barring him from proceeding therein and directing him to hand up to defendant the bill of exchange on which provisional sentence was claimed.

On the 12th July last year the present respondent moved for provisional sentence for £360 on an acknowledgment of debt alleged to be due as agency or commission on the sale of two farms.

On that occasion provisional sentence was refused, the plaintiff to go into the principal case, and costs to be costs in the cause.

Thereafter the plaintiff through his attorneys informed the defendant that he had decided not to proceed with the action, but refused to return the draft unless informed of reasons which justified the defendant in demanding delivery of the said draft or bill of exchange. He, however, through his attorneys sent the defendant's attorney a cheque for £21 15s., being the amount of his taxed costs, which cheque was not however cashed. The applicant now alleged that the respondent's attorneys had failed to give the Registrar of the Supreme Court any notice of withdrawal. That he (applicant) was desirous of having the matter brought to a final settlement and had instructed his attorney to press the matter. It was further alleged on affidavit that the respondent's son Mr. A. J. Schickelring, had the draft or bill of exchange for £360 framed and exhibited to public view in his shop or store at Langebaan, Saldanha Bay, thereby injuring the credit of applicant.

Mr. Schreiner, Q.C., was heard in support of the application, and contended that under rule 25 the defendant was entitled to final judgment, as the matter was *res judicata* between the parties. The plaintiff not having availed himself of rule 330, the plaintiff was entitled to final judgment.

Mr. Juta for the respondent was not called upon.

The Chief Justice said the Court was really asked now to frame a new rule for regulating the procedure in provisional cases. When that was required the Court would consider it and frame a rule, which would have to go through the ordinary course. At present where a plaintiff who had failed in his action withdrew, there was an end to the matter. It had never been known that a defendant had come into court to ask for judgment as in the case now presented.

Mr. Schreiner: I have moved myself under circumstances exactly similar.

The Chief Justice said he doubted whether there would be found a case, notwithstanding what Mr. Schreiner said, where a plaintiff had withdrawn and paid costs, that defendant had afterwards applied for an order for final judgment in his favour. If there was such a case an opportunity would be given to mention it, although it could not affect the present decision, because if there were such a case, the only effect of the judgment would be simply absolution from the instance, and plaintiff would be in no better position than before. Even if there were such a practice, his lordship did not think this case would follow that practice. Here defendant virtually became plaintiff, and asked for judgment as against the former plaintiff and demanded an order that the bill of exchange should be delivered up. It might well be that applicant would have an action for perpetual silence if the respondent insisted in holding out to the public that he had got an action against defendant, but that was another matter. The present application must be refused, with costs.

[Applicant's Attorney, C. C. de Villiers; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

In re SOUTH AFRICAN BANK. } 1898.
Apr. 18th.

Mr. Juta presented the following final report of the official liquidators, which was in the following terms:

In submitting their final report, your liquidators are pleased to state that the favourable realisation of the assets has enabled them from time to time to make a refund of £3 per share to contributories. As all the assets have been realised and all the claims paid, your liquidators have a balance in hand of £242 3s. 6d. for the purpose of making a final refund to contributories, subject to the costs connected with the presentation of this report, and now request: (1) In terms of section 30, Act 12 of 1868, for an order to dissolve the company; (2) in terms of section 40, for authority to destroy all books, accounts, and documents of the bank, or dispose of them in such manner as the Court may direct; (3) for their release from further responsibility.—(Signed) J. A. Bam and B. V. Hofmeyr.

Counsel also asked for the sanction of the Court to the handing over of the books to certain persons who had purchased the remaining assets of the bank.

Mr. Justice Upington remarked that merchants who had been customers of the bank might object very strongly to the books being laid open for the inspection of irresponsible persons. An arrangement might be made by which the purchasers of the debts might be limited to the inspection of those accounts only in which they were interested.

The Court made the usual order as to the report lying open for inspection; in the meantime, the question as to whether the books should be handed over could be considered.

MULLER'S EXECUTORS AND HEIRS } 1898.
V. WILLIAMS. } Apr. 18th.

Mutual will—Adiation—Subsequent will with additional legacies—Notarial deed of release executed by heirs—Renunciation of rights—Family arrangement.

This was the return day of a rule *nisi* granted on 28rd February last.

The petitioners were six of the heirs, the executors dative in the estate of Hilligert Muller, and his subsequently deceased spouse, and the executors testamentary under Mrs. Muller's will.

By the mutual will of Hilligert Muller and his wife, their farm Tweefontein, in the division of Humansdorp, was, after the death of the survivor, bequeathed to the seven children of their marriage in the following proportions: 1,000 morgen and the dwelling house and other buildings to their two sons, and 400 morgen to each of their five daughters on condition that they paid into the estate the sum of £750 for the benefit of the joint heirs, the survivor being enjoined within six months after the death of the first dying to sell the remainder of the estate, both movable and immovable property. Mrs. Muller survived her husband, adiated, and executed a will on the 12th February, 1884, by which she confirmed the mutual will of 1870, in so far as concerned the bequest to her two sons, but bequeathed two additional pieces of land to her five daughters.

Afterwards, on the 9th August, 1892, all the heirs under the two wills, including the present respondent, who was married in community of property to one of the heirs, since deceased, and who represented his minor daughter, executed an agreement by which they agreed to release and discharge each other from the terms of the said wills and to divide all the said property in equal undefined shares, share and share alike, that is to say, one-seventh of the whole of the said property to each of them, and further, to release the female heirs from paying the £750 into the estate in terms of the mutual will.

As a minor was interested, application was made to the Court for its sanction to the above agreement, but the father of the minor refused to join in the application, on the ground that he had signed the agreement under a misapprehension.

The matter was submitted to the Master, and on his suggestion a rule *nisi* was issued on 28rd February, calling upon the respondent to show

cause why transfer in undefined shares should not be passed to the heirs in terms of their application, and why the respondent's action in consenting to the notarial deed of 9th August, 1892, in so far as the same concerned the minor, should not be ratified and confirmed, and why he should not be authorised in his capacity as executor testamentary in the joint estate of himself and his predeceased spouse to receive transfer of the share to which his predeceased spouse would have been entitled if alive.

Mr. Sheil now moved that the rule nisi should be made absolute.

Mr. Schreiner, Q.C., opposed, and read the respondent's affidavit, in which he alleged, *inter alia*, that the two additional pieces of ground bequeathed by Mrs. Muller to her five daughters formed part of the joint estate of herself and her predeceased husband, and that by her will, executed in 1884, she had altered in several material respects the dispositions contained in the mutual will, and that he was advised that in so far as the second will was in conflict with the mutual will it was inoperative and void in law.

That it was the duty of the executors to have sold the said two pieces of ground, and to have distributed the proceeds equally amongst the seven children of the testators, but that they had not done so, nor accounted for the same to the heirs.

That the said two pieces of ground were valued for Divisional Council purposes at £725, and that on this basis of valuation one-seventh share would be worth £108 11s. 5d., of which by the mutual will of himself and his deceased spouse he was entitled to a half share by virtue of his marriage in community, and also to a child's share as one of the heirs, in all to £77 18s. 6½d., the remaining share thereof belonging to his minor daughter, and amounting to £25 17s. 1¼d.

That he did not sign the notarial agreement of 9th August, 1892, in full knowledge of the foregoing facts, nor did he sign it in his individual capacity, and that it ought not to bind him individually, that he signed it in error of judgment and in ignorance of facts.

Finally, that the granting of the order of Court as prayed for by the petitioners would be to change the dispositions of the mutual will of Hilligert Muller and his spouse, as well as his own will with his deceased spouse, and would injure him in his rights under the said wills.

Mr. Schreiner, Q.C., contended that the respondent was not aware of his rights under the mutual will of his wife's parents at the time he signed the deed of agreement, and that his having signed that deed could not be construed as being a renunciation of his rights. Further, he did not sign it in his individual capacity. The Court always required the clearest proof of the renuncia-

tion of legal rights. He cited "*Ewers v. Resident Magistrate of Ondtshoorn*" and "*The Trustee in the Insolvent Estate of Roberts*" (Foord, p. 82), and "*Watson v. Burchell's Executors*" (1 C.T.L.R., 296).

The Chief Justice said he quite agreed with Mr. Schreiner that the Court ought not to presume that any person intended to renounce his rights without the clearest proof of such renunciation. That proof was best afforded by an express renunciation, because when rights were expressly renounced no question could arise. But renunciation could also be proved as a clear and necessary inference from all the proved facts in the case: Very clear evidence must be adduced from the facts to justify the Court in holding that respondent did renounce his rights. It was obvious that if he did renounce any rights, they were renounced not in favour of strangers, but in favour of his own daughter. At the time the notarial document was drawn all the wills were well known to the respondent. In fact, they were recited in this very notarial deed. If the agreement had been authorised or signed by respondent in his individual capacity, as well as in his capacity as guardian of his child, there would have been no doubt whatever. His lordship was of opinion that, with full knowledge of his rights the respondent renounced in favour of his daughter. Reliance had been placed upon the technical objection that he had not signed in his individual capacity, but that did not affect the renunciation. It followed as a necessary consequence inasmuch as he appeared on behalf of his minor daughter, and inasmuch as the consequence of that act was to give that daughter certain rights, the Court must hold that he had renounced in her favour. Respondent ought to have known what his rights were. His lordship had no doubt he knew what those rights were. Subsequently, however, he thought better of what he had done, but it was too late. It was strictly a family arrangement to which the Court had always endeavoured to give effect if it could be done without injustice to the parties. The rule would therefore be made absolute, the respondent to pay the costs of opposition.

Applicant's Attorney, John Ayliff; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

Ex parte PIENAAR—In re GODDEN { 1898.
V. PIENAAR. { Apr. 18th.

Chief Magistrate.

Application for review of proceedings in the Chief Magistrate's Court of Griqualand East refused.

This was the application of Hannah Pienaar, of

Kokstad, duly assisted by her husband, Piet Pienaar.

It appeared from the petition that on the 5th January, 1893, one Mary Godden issued a summons from the Court of the Resident Magistrate of Kokstad against the applicant for the sum of £8 16s., being the value of a certain stuff dress left and deposited with the defendant (present applicant) for washing and repairing, and which the defendant had refused to restore.

That applicant excepted to the summons on the grounds:

1. That plaintiff, being a minor under the power of her father residing at Kokstad, could not appear in court, but should appear by her father. (The summons stated that the plaintiff was duly assisted by her father as far as need be.)

2. That defendant, being married in community of property to her husband, should have been sued by directing the summons against her husband in this particular case, she not carrying on any trade by herself, and living with her husband. That the Resident Magistrate of Kokstad on the 9th January, 1893, dismissed the action on the exceptions. That thereupon the plaintiff appealed to the Chief Magistrate of East Griqualand, who on the 14th February, 1892, overruled the judgment of the Resident Magistrate and dismissed the exceptions.

Applicant complained that the proceedings thus sanctioned by the Chief Magistrate were irregular and contrary to law, and prayed that the Court might be pleased to review the proceedings of the Chief Magistrate's Court in the said action, and make such directions or grant such further or other relief as might seem in accordance with good and substantial justice.

Mr. Juta was heard in support of the application, and contended that the exceptions taken to the summons were good and should have been sustained on appeal. He cited the "Queen v. Nathanson" (5 Juta, 109), and "Selby v. Friemond" (5 Juta, 266). The proceedings in the Chief Magistrate's Court had been grossly irregular within Ordinance 40 of 1828, section 5, and should be reviewed.

The Chief Justice said the case was reduced to this, whether there had been such gross irregularities in the proceedings as to justify the Court in overruling the decision of the Chief Magistrate of East Griqualand. His lordship was of opinion that there ought to be an appeal from the judgment of Chief Magistrates. If an appeal were allowed, the laws administered in this colony and in the Transkei would be assimilated, but until that appeal was given the Court could only exercise their general powers of review. The first irregularity complained of in the present case was that the summons did not show that the plaintiff appeared by her father, but the father

himself did not appear as plaintiff. Defendant ought to have satisfied the Court before making this application that the father did not give a warrant to bring this action. There was no proof that he had not done so. For aught they knew the father might have given his warrant. As to the second irregularity the Court had no statement by defendant Hannah Pienaar that the circumstances were such that she should not have been sued alone. Apparently, she carried on the business of a washerwoman; and if she carried on that business for her own benefit she might be sued in respect of her business as a washerwoman if she refused to return the articles sent to her for washing purposes. On the whole, there was not sufficient proof of such gross irregularity as would justify the Court in setting aside the ruling of the Chief Magistrate.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice,) Mr. Justice BUCHANAN, and
Mr. Justice UPINGTON, K.C.M.G.]

WOLFF V. WOLFF. } 1893.
} Apr. 14th.

Mr. Sheil, on behalf of petitioner, moved for leave to sue *in forma pauperis* in an action against her husband for divorce.

Referred to counsel.

IN THE ESTATE OF THE LATE GYSBERT KLEYN.

Mr. Sheil moved for the appointment of a *curator ad litem* to represent the minor children of Willem H. S. Kleyn in respect of the subdivision of the farm Mistkraal, in the district of Oudtshoorn, portion of which will devolve upon them as *fiduciary* heirs.

The Court made the order, and appointed Mr. W. H. S. Kleyn *curator ad litem* with the powers asked for.

In re THE MINOR CATERINA LOUBSER.

Mr. Juta moved for authority to the Master of the Supreme Court to pay to the tutor dative of the said minor an annual allowance out of the inheritance devolving upon her from the estate of her parents, for education and maintenance.

The Court made the order.

ATKINSON V. ATKINSON.

Mr. Castens moved to make absolute the rule nisi admitting applicant to sue respondent, her husband, in *forma pauperis* in an action for restitution of conjugal rights, failing which for divorce, and for custody of the child of the marriage.

The Court made the rule absolute.

Ex parte THE MUNICIPALITY OF VILLIERSDORP.

Mr. Castens, on behalf of the Municipality, asked the Court to make absolute the rule nisi for the attachment of five even in the said Municipality, in order that they may be sold in execution for the payment of the rates and taxes due thereon.

Granted.

SWANEPOEL V. BIRK. { 1898.
Apr. 14th.

Summons—Mistake in name of defendant—
Amendment allowed—No order as to costs.

Mr. Juta moved for leave to amend the summons and declaration in the said suit by substituting the correct name of the defendant for that erroneously set forth in the process, and for an order that the defendant do pay the costs of the application, or at least costs of opposition. Defendant had been sued in the name of Edward Burke, by which he was generally known, instead of by his proper name of Johannes Ludivicus Birk.

The defendant did not appear.

The Chief Justice said the initial mistake was made by the plaintiff himself. He now asked for leave to amend the summons and declaration. Of course the Court would allow an amendment. It was clear a mistake was made; but the plaintiff went further, and asked for costs against defendant, and if defendant had opposed this application he would have been liable, but practically he had done no more than refuse to give consent. The only additional costs that were incurred were for the affidavit. The amendment would be allowed, but there would be no order as to costs.

IN THE MATTER OF THE MINOR ABRAHAM KRUGER.

Mr. Juta moved for authority to the tutor dative of the said minor, who is over eighteen years of age, and is farming on his own account, to concur in the proposed partition of certain portions of the farm Vaalepoort, situate in the

district of Albert, in which other persons are co-proprietors, the said partition being for the benefit of the said minor.

Granted.

Ex parte DE VILLIERS—*In re* ESTATE { 1898.
OF THE LATE LUCAS P. STEEN- { Apr. 14th.
KAMP.

Costs.

Where judgment had been given in an action for a declaration of rights against an executrix testamentary and another defendant, and one-half of the costs were ordered to be paid out of the estate in which the plaintiffs had a reversionary interest, the Court declined to grant an order authorising the executrix testamentary to mortgage the landed property in the estate for the purpose of enabling her to pay her share of the costs.

Mr. Joubert moved for leave to the executrix testamentary to raise a loan on mortgage of the farm De Brug to enable her to pay the costs of the action instituted against petitioner by Lucas P. Steenkamp and others, in which judgment was given for plaintiffs; costs to be paid by a co-defendant (Ras), and out of the said estate.

On the 21st February last the present petitioner's children by a former marriage instituted an action against her and others, including one Ras, for a declaration of rights (*ante* p. 58.)

Judgment was given in favour of the plaintiffs, and the costs were ordered to be paid by the petitioner and Ras.

The petitioner's share of the costs amounted to £142 2s. 11½d., and as she alleged that she was unable to raise this sum from other sources, she now applied for authority to raise a loan by way of mortgage on the farm De Burg (the subject of the action and in which the plaintiffs have a reversionary interest) for the purpose of paying her share of the costs, and of the present application.

The Court made no order.

[Applicant's Attorney, W. E. Moore.]

BLAINE AND CO. V. HUTCHONS.

Mr. Sheil moved to make absolute the rule nisi for an interdict restraining the respondent from passing transfer of certain four lots of ground situated in Dordrecht pending a settlement of applicant's claim against the respondent's husband.

The rule was made absolute with costs.

Ex parte THE BOARD OF EXECUTORS { 1898.
AND CARTWRIGHT. { Apr. 14th.

Executor testamentary—Absence from the Colony — Transfer of land — Solemn declaration—Act 19 of 1891, section 5.

The Court authorised two executors testamentary, without making the solemn declaration under Act 19 of 1891, section 5, to pass transfer of landed property sold in the estate without the assistance of the third executor, who had been absent from the Colony since 1868, and who was reported to be dead, but no proof of his death was before the Court.

Mr. Sheil presented the petition of the Board of Executors and of John Dean Cartwright, who together with one Jacob Watermeyer were appointed executors testamentary of the estate of the late Jacob Watermeyer.

In February, 1868, certain property situate at Sea Point belonging to the said estate was sold, and the purchase amount paid, but transfer thereof was not given to the purchaser.

The aforesaid Jacob Watermeyer shortly thereafter left this colony, and the petitioner J. D. Cartwright, his brother-in-law, has since been informed of his death, which information he believes to be true.

The purchaser of the property, Johan Coenraad Wicht, has since died, and the representative of his estate is now desirous of obtaining transfer of the property purchased, and has called upon the petitioners to give transfer thereof.

They therefore prayed for an order authorising them to pass transfer. The Registrar of Deeds had refused to pass transfer unless a declaration in terms of Act 19 of 1891 was furnished.

The Chief Justice said the Court would make the order considering that the co-executor had been absent since 1868. They could not state that he was dead, but they could give authority to the two executors to act.

[Applicants' Attorney, Paul de Villiers.]

LEWIN V. GREEFF AND THE REGISTRAR OF THE SUPREME COURT { 1898.
—GREEFF V. LEWIN. { Apr. 14th
& May 2nd.

Judgment—Rule 329 (d)—Application for leave to enter appearance—Defence—*Bona fides*.

This was an application upon notice calling the respondents to show cause, if any,

(1) Why the applicants should not be allowed to enter appearance to the action instituted against

them by summons bearing date the 29th March, at the suit of the first-named respondent, and to plead to the declaration, and further,

(2) Why the first-named respondent should not be interdicted from selling, alienating, or otherwise disposing of any portion of the farm "Vischkuil aan den Buffel Rivier," as notified in the *Worcester Advertiser* of the 1st April instant, pending the result of the said action,

(8) Why the costs of this application should not be costs in the cause.

The facts as gathered from the affidavits are as follows:

Sometime ago the respondent Greeff sold to the applicant the farm "Vischkuil aan den Buffel Rivier" for the sum of £8,000 payable in certain instalments, none of which were paid.

Subsequently Greeff signed a receipt in which he acknowledged to have received £1,000 from the applicant, being the last instalment of the purchase price.

On the strength of this receipt the applicant claimed transfer of the farm and threatened to bring an action; no action was, however, brought by him, but the respondent Greeff issued a summons against the applicant for £500, being the first instalment of the purchase price of the farm, and also for £65 interest overdue on the unpaid balance.

Towards the latter end of March last the applicants' attorney had several interviews with the attorney for the respondent Greeff and it was arranged, in order to avoid expense and delay, that the former should write to his clients and obtain their warrant to accept service of summons and enter appearance.

On the 28th March the applicants' attorney wrote to Greeff's attorneys as follows:

"We have to-day received a power of attorney from Mr. and Mrs. Lewin, so please serve on us the summons and declaration intended for them."

On the same day a copy of the declaration was served, and on the 29th the summons was issued and served.

Copies of the summons and declaration were then forwarded to the applicants by their attorney with a request for instructions as to plea.

On the 7th April applicants instructed their attorney to write and object to the sale of a part of the farm "Vischkuil" advertised by plaintiff (Greeff), as this property formed part of the matter in dispute between the parties.

On 8th April (on the evening of which the four days' grace allowed for entering appearance expired) applicant's attorney was engaged with his client in taking particulars of his defence preparatory to drafting the necessary instructions for counsel to draw the formal plea.

On 10th April applicant's attorney caused the warrant to be filed with the Registrar and notice

of appearance entered to be served on respondent's (Greeff's) attorneys. It was then discovered that the cause had been set down for judgment under Rule 829, for the 12th April, and later on the warrant was returned by the Registrar, with a communication to the effect that as appearance had been entered after the cause had been set down the warrant was returned.

At the date of the present application the papers were in the hands of counsel for the purpose of having the plea drafted.

On application being made to the respondent's attorney to remove his set down he refused to do so.

A copy of the *Worcester Advertiser* was put in containing a notification of a proposed sale by the respondent Greeff of the "remaining extent of the farm Vischkuil aan den Buffel Rivier," whereas the applicants claimed that the whole of the said farm, inclusive of such remaining extent, was included under the deed of sale annexed to the declaration, and they now applied for an interdict restraining the sale of any portion of this farm pending the result of the action.

Mr. Molteno was heard in support of the first application, and contended that the Registrar should not have returned the warrant to appear. There was no procedure for barring for non-appearance as for not filing plea (Rule 830B).

The applicant had served his declaration and therefore knew that the case was defended. He should have proceeded under Rule 830B.

The attorneys for the parties had discussed the matter together and knew that the case was going to be defended.

Mr. Juta for Greeff applied for judgment in default of appearance in terms of the prayers A and B of the summons. He abandoned the prayer C, according to notice. He prayed for judgment for £500, and for the further sum of £85, being the interest from 1st January, 1898, to 28th February, 1898.

At the request of the Court counsel for the applicants handed in the draft plea.

The Chief Justice said the Court had always allowed very great latitude to defendants who could satisfy the Court that they had a *bona-fide* defence, and even if there had been some delay the Court would always allow the defence. In this case, so far as the attorneys for defendants were concerned, there had been no delay. If he (the Chief Justice) had an idea that the defence to be set up was going to be a *bona-fide* defence, this was one of those cases in which the Court would allow the defendants to set it up. But his lordship was not satisfied that the defence was *bona fide*. The Court had read the plea, which was a most extraordinary one, and so far as he could gather from the facts of the case, it appeared that defendant was simply

taking advantage of this document, by which there was a reduction of the purchase price from £8,000 to £7,000, and an acknowledgment by plaintiff of having received £1,000 in order to make this reduction. So far as his lordship could gather, there was no *bona-fide* defence. In regard to the further question as to the extent of land sold, that need not arise. What the plaintiff sued for was the first instalment of £590 and interest of £65, and that at all events defendant would have to pay, whether the Court should find that the smaller or the larger portion were sold. Defendant's (Lewin's) application would be refused with costs, and there would be judgment for plaintiff (Greeff) with costs for £550 and £65 interest.

Mr. Juta, in the same matter, now applied for an interdict restraining the said Lewin from interfering with or occupying the remaining extent of the farm "Vischkuil aan de Buffels Rivier," in the district of Prince Albert, and also from receiving any of the rents payable to petitioner by the lessees thereof.

The Chief Justice said at present they could go no further than grant the rule nisi (which would be made returnable on the first day of next term) calling upon respondent to show cause why the interdict should not be granted as craved, the rule to act as an interdict in the meantime, and applicant to receive the rents and account for them afterwards if found liable.

Afterwards on 2nd May the Court made the rule absolute, leave being given to the defendant to bring his action.

[Lewin's Attorneys, Messrs. Van Zyl & Buisinné; Greeff's Attorney, C. C. de Villiers.]

ELLERTON SYNDICATE V. HUTCHINGS. 1898.
Apr. 14th.

Shares—Attachment *ad fundandam jurisdictionem*.

The Court ordered the attachment of shares to found jurisdiction in an action against a defendant who, although domiciled in the South African Republic, was at the date of the order residing within the jurisdiction.

Mr. Molteno applied for authority to attach 1,183½ shares belonging to defendant, John Hutchings, in the Ellerton Gold-mine Company (Limited), in order to found jurisdiction in this Court in an action to be instituted against him by plaintiffs under the following circumstances.

In 1890 the Committee of Management of the above Syndicate engaged the services of the respondent at £60 per month to manage and transact the business of the syndicate in relation

to its claims at Zoutpansberg, and afterwards it was resolved to allow him an interest in the syndicate equal to that of the paying members in consideration of his services.

The syndicate was subsequently floated into a company, the respondent acting as the agent for the syndicate in the preliminary negotiations.

The applicants alleged that the respondent secretly and without the knowledge of his principals entered into an agreement with two of the promoters of the company (Messrs. Marshall and Morty) for the payment to himself of the following:

(a) £200 in cash.

(b) In the event of a company being floated 10 per cent. of the net gold won after paying working expenses and 10 per cent. of the shares accruing to the promoters (Marshall and Morty) on the floating of the company.

The applicants were advised that they had a good cause of action to obtain the full benefit of the aforesaid secret contract between the respondent and Marshall and Morty and an account of all moneys and shares received by him thereunder, and to compel payment of such money and delivery of such shares.

They therefore asked leave to attach 1,188½ shares in the company, belonging to the respondent, and in their possession (as he was domiciled in the South African Republic) *ad fundandam jurisdictionem*, pending the bringing of an action.

The attorney and general agent of the respondent alleged in his affidavit *inter alia* that he had always been ready and willing, and had tendered and was still prepared fully to submit the respondent to the jurisdiction of the Court, to accept service of process, and to defend the contemplated action of the applicants. That he considered respondent financially able fully to satisfy any judgment of the Court in the event of his being unsuccessful in the action, and he prayed that the petition might be dismissed with costs.

The respondent in his affidavit alleged that he had come down to Cape Town for the purpose of commencing an action against the syndicate for delivery of his shares and for damages by reason of non-delivery. He confirmed his attorney's submission to the jurisdiction of the Court.

He alleged that he intended to reside in the suburbs of Cape Town for some time to come, and if necessary he was personally prepared to submit himself to the jurisdiction of the Court and to accept service of process, and if necessary he was quite prepared to remain in Cape Town until the action between the syndicate and himself had been decided.

Mr. Juta, for the respondent, contended that where a defendant was resident within the jurisdiction, as in the present case, property could not be attached to found jurisdiction, as the Court had

already jurisdiction. He cited *Schunke v. Taylor and Symonds* (8 Juta, 108).

The Chief Justice said he had nothing to add to what he had said in the case of "*Schunke v. Taylor and Symonds*," reported in 8 Juta, p. 108. It was quite clear that the plaintiffs applied for the attachment with a double object, that was, not only to facilitate proceedings against the defendant, who was not domiciled in the Colony, but also to obtain security; and if the law gave them that advantage, they were entitled to take it. Of course the Court could not order an attachment of more property than would be sufficient to meet the plaintiffs' claim, especially as the defendant was in the jurisdiction at the time when the order was made. At present they had no information as to what was the really true value of the shares or what plaintiff's claim really was. Plaintiffs ought to bring on their action as soon as possible. Meantime the application would be allowed; service to be effected upon defendant personally or his agent; the costs of this application to be costs in the cause.

[Applicants' Attorneys, Messrs. Scanlen & Syfret; Respondent's Attorney, C. C. Silberbauer.]

ABRAMS V. ABRAMS. { 1898. Apr. 14th.

Mr. Sheil moved to make absolute the rule *nisi*, admitting applicant to sue her husband *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce.

The Court made the rule absolute.

MOSES FLETCHER V. CAPE TOWN COUNCIL.

Mr. Molteno, on behalf of petitioner, moved for an interdict to restrain the Town Council from removing the stoep in front of his shop at 54, Caledon-street.

The Court made the order, the rule to be returnable on Tuesday next, calling upon the Council to show cause why they should not be interdicted from proceeding with the demolition of the stoep, the rule to operate as an interdict in the meantime.

BUNESKI V. BUNESKI.

Mr. Molteno moved for the appointment of a commission to take evidence on behalf of plaintiff in this action. The witnesses to be examined were in Birmingham, and the ground of the action was alleged adultery.

The Court appointed Mr. W. E. Richardson, of Birmingham, commissioner, and falling him Mr. Mackarnes, barrister-at-law

REGINA V. PILKINGTON. { 1898.
Apr. 14th.

Liquor Licence—Sale—Delivery—Act 28 of 1883, Section 73, sub-section 7—Contravention—Conviction—Appeal.

P., the holder of a retail licence to sell wine and spirits from 8 to 9 a.m., and from 6 to 8 p.m., on all days of the week except Saturday, and on that day from 8 to 9 a.m. and from 2 to 5 p.m., sold L. two bottles of wine on Saturday, the 4th of March, 1892, before 5 p.m.

L. gave instructions that the wine was to be sent to the boarding-house at which he was staying.

The wine was not delivered immediately after the sale, but as it was being sent on the same evening between 7 and 8 p.m. to the purchaser's boarding-house, it was seized by a constable and P. was tried and convicted for contravening Act 28 of 1883, Section 73, sub-section 7.

Held on appeal that as the sale had been completed before 5 p.m. there had been no contravention of the Act.

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate of Port Nolloth. The accused was charged with the crime of contravening Act 28 of 1883, section 73, sub-section 7, in that upon or about the 4th March, 1892, and at or near Port Nolloth, the said Harry Pilkington did wrongfully and unlawfully sell or expose liquor for sale during a time, to wit, between the hours of seven and eight p.m., when he was not authorised by his licence to sell, and did then and there sell, or dispose of, or cause to be sold or disposed of, certain spirituous liquor, namely, two bottles of wine.

The accused, as well as carrying on the business of a general storekeeper in partnership with his brother, is the holder of a retail wine and spirit licence on the following conditions: That the hours of opening the canteen be from 8 to 9 a.m. and from 6 to 8 p.m. and on Saturdays from 8 to 9 a.m. and from 2 to 5 p.m.

The evidence taken at the trial went to show that on Saturday the 4th March, 1892, before 5 p.m. a Mr. Loynes ordered two bottles of wine at the defendant's store, paid for them, and gave instructions that they were to be sent to the boarding-house at which he was staying.

The order was not immediately executed, but according to the evidence for the defence, the two bottles of wine were taken out of the canteen,

packed in straw envelopes, and put in the general store ready for delivery.

Afterwards on the same evening between 7 and 8 p.m. the accused went to the store and sent his errand boy with the wine to Mr. Loynes. Before it was delivered, however, it was seized by a police constable and handed over to the chief constable, who in the presence of the former asked the accused if he had supplied it, whereupon the accused answered "Yes," that the order had been given, and that it had been forgotten to be complied with.

The constable who seized the wine swore that on the evening in question he saw the accused take two bottles in straw envelopes from the canteen between 7 and 8 p.m., that he waited for about fifteen minutes outside and that he then saw the boy come out with a parcel under his arm, and that the parcel was the same as that produced in court, containing the two bottles of wine.

One of the witnesses for the defence (William Clelland) swore that he was in the accused's store between 4 and 5 p.m. on that Saturday, and that he saw a parcel addressed to Mr. Van Schicht (the proprietor of the boarding-house at which Mr. Loynes was staying) lying on the counter, and although he could not say what the contents were, he thought it contained bottles. That it was done up in a brown paper and had the label produced in court on it.

The accused was found guilty and sentenced to pay a fine of £2 or seven days' imprisonment. The following being *inter alia* the Magistrate's reasons:

"Section 73, under which the accused was charged, states that any holder of a licence allowing any liquors purchased before the hour of closing to be consumed on such premises becomes liable to a penalty of £10. This must equally apply to the delivery of liquors in bottle, otherwise any person by ordering beforehand might be supplied at any time of the day or night, or even on a Sunday if he had ordered on a week day during open hours."

"Further, it would be almost impossible to prove in any case that the liquor had not been ordered during open hours, and the conditions imposed by the Licensing Court, and the Licensing Acts themselves would become a dead letter."

The Magistrate after reviewing the evidence goes on to say:

"I find that there is sufficient evidence to prove a contravention of the law, and that in the absence of evidence by the defence as to what became of the two bottles seen to be fetched from the canteen after closing hours, it must be presumed that the parcel seen by Clelland did not contain liquor, and that that seized by the constable contained the identical two bottles seen by

him to be fetched from the canteen by the accused between 7 and 8 o'clock."

From this judgment the accused now appealed. Mr. Juta was heard in support of the appeal, and contended that it was clear that the sale had taken place during the hours in which the appellant might sell, although the delivery did not take place until afterwards. The sale being completed before five p.m., there had been no contravention of the section.

Mr. Giddy for the Crown.

The Chief Justice said it was clear that the Magistrate had directed his attention to one point only, and not as to whether the sale had actually been completed before five o'clock. He only found that an order had been given before that hour, but that order if not paid for was revocable. If the liquor had been paid for before five p.m., there had been an out and out sale, and the decision of the Resident Magistrate was wrong. So that everything depended upon the question whether the liquor had been paid for before five o'clock. The matter would, therefore, be referred back to the Magistrate to find whether he had found as a fact that the liquor had been paid for before five p.m. on the day mentioned.

On the matter being referred to the Magistrate he reported as follows:

In cross-examination, Mr. C. Pilkington stated that Mr. Loynes gave the order (for the liquor) on his own account, and paid for the liquor. I found that the order was given before closing hours, and as the latter part of the statement regarding the payment was uncontradicted, and there was no evidence to prove that it had not taken place at the time stated, I accepted that statement as a fact.

The Court on hearing this evidence quashed the conviction.

[Appellant's Attorney, J. W. Sauer.]

REGINA V. NOFAME. } 1898.
Apr. 14th.

Native Territories Penal Code—Act 24 of 1886, Section 198—Contravention—Identification of stolen property—Conviction sustained on appeal.

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate for the district of St. Marks, Tembuland.

The appellant, his son Mawelli, and his father-in-law Klaas were charged with the contravention of Act 24 of 1886, section 198, in that upon or about the 7th day of October, 1892, and at or near Nthlonza in the said district, the said Nofame,

Mawelli, and Klaas did wrongfully steal five sheep, the property of Adonis, and did then and thereby contravene the above-cited section of the Penal Code.

From the evidence taken at the trial it appeared that on the morning after the theft the bones of a sheep were found in a river near the kraal of the accused. There were also found in Nofame's kitchen hut (which he refused to open alleging that he had lost the key) a sheep's head, skin, and wool, which Adonis recognised as his property, whilst Klaas asserted that they were his. Nofame accounted for the presence of these latter by the fact of his having, as he alleged, killed one of his father-in-law's sheep on the previous evening, and he stated that what was found in his kitchen was the remains of the sheep which he had killed.

His evidence on these points was corroborated by that of other witnesses called for the defence.

The prisoners Mawelli and Klaas were acquitted, Nofame was found guilty and sentenced to pay a fine of £20 and to be imprisoned and kept at hard labour for a period of twelve months; £8 were awarded to the owner of the sheep, Adonis, and £1 each to two assistant headmen.

From this sentence the prisoner now appealed.

Mr. Shell was heard in support of the appeal and contended that there was no evidence to connect the appellant with the theft of the five sheep lost by Adonis. The only suspicious circumstance in connection with the matter was the finding of the head and skin in the appellant's hut, but his explanation was perfectly satisfactory, and was confirmed by the evidence of Klaas and the other witnesses called for the defence. As to the question of the prisoner's not allowing his kraal to be searched, he cited "*Regina v. M'Balo and Matinvana*" (2 C.T.L.R., 284). A jury would not have convicted on such evidence, and the conviction should be quashed.

Mr. Giddy, for the Crown, was not called upon.

The Chief Justice said it was quite clear that five sheep had been lost, and that the head of one of the sheep, at all events, was found in the possession of the appellant. It was quite true that the particular marks had been obliterated, but it did not follow that the owner might not by its general appearance be able to identify the head of the sheep. He was positive that it was the head of his sheep. Klaas was equally as positive that it was his sheep, but the Magistrate believed Adonis. The whole conduct of prisoner was suspicious. He gave false reasons when asked to open his hut. He stated that he had lost the key, and ultimately when the hut was searched the remains of a sheep were found, which were identified in the manner described. Under these circumstances the Court must find that the

Magistrate was right, and the appeal must be dismissed.

Their lordships concurred.

[Appellant's Attorney's, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), and Mr. Justice BUCHANAN.]

FLETCHER V. TOWN COUNCIL { 1898.
OF CAPE TOWN. } Apr. 18th.

Interdict—Trespass—Municipal Regulations
—Removal of stoeps—Notice—Waiver.

When an interdict is applied for the applicant should state not only the facts in his favour but also those which might induce the Court not to grant the interdict.

This was the return day of a rule nisi granted on Friday last and which operated as an interdict restraining the respondents from removing a stoep in front of applicant's shop, 54, Caledon-street.

The facts upon which the rule was granted are as follows:

The Town Council by themselves or their servants or workmen were commencing to remove the stoep in front of applicant's shop without his consent and against his will.

The Council stated it to be their intention to remove the said stoep and to make steps inside the said shop, the floor of which is considerably higher than the level of the street.

The shop is a small one, and the applicant alleged that should steps be placed inside it would seriously damage him in his business, as it would be almost impossible for customers to enter the shop unless applicant incurred a very heavy expenditure in enlarging the shop and removing shelves, counter, and other fittings.

The stoep was alleged to have been in its present position from time immemorial.

It was further stated upon affidavit that the Council had not given the applicant the thirty days' notice required by Municipal Regulation No. 205, nor had they made any offer of compensation.

Applicant further alleged that the Mayor of Cape Town had asked him privately if the stoep could be removed, and that applicant said that for the public good he would not object, provided they did not hurt his shop. That the Mayor then told him that they would place good steps to his door.

That it was only when the workmen began

to remove the stoep of the next house that he ascertained that they were going to place steps inside his shop, and move his door about four feet back. That if this were done, he would have to alter his counter, move part of his shelves, and make other alterations at considerable expense.

Finally, the applicant said that if the Council made the necessary alterations to his shop and placed steps outside his door, he would have no objection to their removing the stoep or doing anything for the public good.

Mr. Moltene now moved that the rule nisi be made absolute.

Mr. Searle, for the respondents, opposed, and read the affidavit of the Mayor, from which it appeared *inter alia* that the Town Council had recently sanctioned the making of a continuous pavement along one side of Caledon-street for the benefit of the public generally; that he (the Mayor) asked applicant if he would give his consent to the removal of the stoep; that applicant replied, "Certainly, I shall have no objection. I want nothing, as it is to be a very decided improvement."

The Mayor further alleged that about 9.30 on the morning of the 14th inst., before the interdict was granted, he, in company with the City Engineer, Clerk of Works, and another official (Mr. Wallis), interviewed the applicant with a view to ascertaining the reason of his applying to the Court; that he asked him (applicant) what he wanted done, but that his demands were so unreasonable that they could not be accepted.

That he (the Mayor) offered to make good everything undone, and to place back the steps in a manner which would leave his fixtures undisturbed; that he (the Mayor) offered to lower applicant's shop-door and to replace the existing fanlight by a larger one, and, in short, promised that the Council would do everything within reason.

Deponent denied that applicant would sustain any damage by the proposed street improvements.

It appeared from the affidavit of Mr. Wallis, a clerk in the City Engineer's office, that the applicant had full notice of the Council's intention to remove the stoep, and that applicant stated that he would have no objection provided no expense was incurred by him.

This deponent also alleged that the consent of the owner of the property (Mrs. Wilson) to the removal of the stoep had been received through her agent.

The affidavit of Mr. Francis Hugo Skead deposed to a conversation which took place between the Mayor, the applicant, and the deponent, and alleged that he had no doubt whatever that the applicant on that occasion gave an unhesitating consent to the removal of his stoep, the only condition being that the Council should

bear all the necessary expense connected with the matter, which, deponent alleged, the Mayor promised should be done.

Mr. Molteno was heard in support of the rule. He contended that no notice as required by Municipal Regulation No. 206 had been given. He referred to section 67 of the Cape Town Municipal Act, and to the Lands and Arbitration Clauses Act, 1882, section 1, sub-section 1. The notice required was a written notice, together with a demand as to the compensation. Applicant had agreed to the removal of the stoep, but there was no agreement allowing the Council to trespass and make alterations in his shop. "*Lawley v. Cape Town Council*" and "*Bruce v. Cape Town Council*" (9 Juta, 8) decided that Regulation 206 was *intra vires*, and did not affect the point at issue in the present case. No notice letting applicant know that his shop would have to be altered had been served, and he was justified in applying for an interdict.

Mr. Searle was not called upon to reply.

The Chief Justice said: If the facts which are now before the Court had been brought to the notice of the Court when the original application was made, it would have been instantly refused. The original petition left me under the impression that the applicant was the owner of this property. It turns out now that he is only the lessee. The petitioner also left me under the impression that there had been no previous communication between himself and the Council, and that without notice to him in any way the Town Council had sent their men to remove the stoep. On the Court requesting further information, a fresh affidavit was filed, and an admission was made that there had been some communication with the Mayor, but the Court was not even then informed that the applicant was not the owner of the premises. Now if we apply the ordinary rule to this case, that the applicant for an interdict should state to the Court not only the facts in his favour, but also those which would induce the Court not to grant the interdict, we should refuse this application. It is said that notice was required to be given, and it is argued that it ought to have been in writing. Supposing that it were written, a written notice could be waived by the conduct of the applicant, and in this case it appears to me that it was waived. It is admitted now that he had consented to the stoep being removed, but he said he did not think the effect of it would be that the stoep would be placed in his own shop. But all the Council wish to do was to remove the stoep. In my opinion if written notice was required, that written notice was waived by the conduct of the applicant. Whether the Town Council is bound now to make a step within the shop or not is a matter that need not now be discussed, but for any damage done to the

applicant I am sure the Town Council will recompense him. All we wished to do by granting the interdict was to prevent the Council from doing an arbitrary act. Everyone is entitled to protection against the arbitrary acts of the Town Council, and on the face of the petition there seemed to have been an arbitrary act, but that impression is removed by the further affidavits. It seems to have been done after due communication with the applicant, and any further remedy he may seek may be sought by means of an action, and not by an interdict. The rule will be discharged with costs.

Their lordships concurred.

[Applicant's Attorney, J. Hamilton Walker.

Respondents' Attorneys, Messrs. Fairbridge & Arderne.]

BOBB V. THE MASTER—*re* BROOME— { 1898.
HEAD'S WILL. { Apr. 18th.

Holograph will—Attestation—Letters of Administration—Master—Wills Ordinance, No. 15 of 1845, Section 3.

B executed a will written throughout in his own handwriting.

The will covered three pages of foolscap paper, but was signed by the testator and witnessed on the third page only.

The testator bequeathed his entire estate to his executors upon trust for the sole benefit of his children, to be equally divided amongst them share and share alike, such share to be paid to each of them upon his or her attaining the age of 21, and in the event of any of them dying before that age, then his or her share was to be equally divided amongst the survivors provided however that so long as his wife lived, to the approval of his executors, single and unmarried the executors were to pay the interest derived from the various investments to her for the support of herself and the children, . . . and in case all the children died before 21, then the executors were to pay the interest derived from the investments to his wife for her sole use and benefit so long as she lived single and unmarried, and on her death or re-marriage, the executors were to realise the estate and hand the proceeds as a bequest to the trustees of the Diocese of Cape Town to be invested by the Diocesan Finance Commission for the use of the Sick and Aged Clergy Fund of

the English Church in South Africa, if such fund should be at the time still existing, but should that fund not be in existence, then the money was to be invested for the benefit of such Diocesan Fund or work as the Lord Bishop for the time being might determine.

The Master, on application being made for letters of administration, refused to grant them on the grounds that the provisions of the Wills Ordinance with regard to attestation had not been complied with.

The Court following Steer's Executors v. The Master (5 Juta, 313) held the will valid, and directed letters of administration to be granted to the executors.

This was an application on notice calling upon the Master to show cause why he should not be ordered to issue letters of administration to applicant, as executor testamentary of the last will and testament of the late William Bromehead. The late William Bromehead, by his last will and testament, appointed the applicant executor of his will and administrator of his estate.

The will was written throughout by the testator, and covers three pages of foolscap paper. It was signed by the deceased and witnessed only on the third page, that is to say on the second half-leaf, but the name "William Bromehead" occurring in the words, "This is the last will and testament of me, William Bromehead," written upon the first leaf, were in the handwriting of the deceased.

The testator bequeathed his entire estate (household furniture, books, jewellery and personal effects excepted) to his executors upon trust to hold for the sole benefit of the children born of his marriage with his wife Mary Louise Anne Bromehead (born Morphew), to be equally divided amongst them share and share alike, such share to be paid to each of them upon his or her attaining the age of twenty-one years; and in the event of any of them dying before attaining the age of twenty-one years, then his or her share was to be equally divided amongst the survivors.

The testator empowered his executors at their option to sell any or all his property (household furniture, &c., excepted as above) and to convert the same into money for the purposes of his will, to invest the same in Government or Corporate stock or on first mortgage of immovable property, the interest thereof to be applied for the sole use of his surviving children, until each attained the age of twenty-one years, when his or her share of the capital sum was to be at his or her disposal.

Provided, however, that so long as his wife

lived, to the approval of his executors, single and unmarried the executors were to pay the interest derived from the various investments to her for the support of herself and the children, but in the event of her not living as aforesaid or of her marrying again, then the executors were to dispose of the interest and other accretments and the capital sum for the sole benefit of the surviving children only. And in case each and all of the surviving children died before attaining the age of twenty-one years, then the executors were to pay the interest derived from the investments and all other accretments to his wife for her sole use and benefit so long as she lived as aforesaid single and unmarried, and on her death, or on her not continuing to live as aforesaid, or on her marrying again, then the executors were to realise all securities, investments, and all the other remaining property and hand the proceeds thereof, as the testator's bequest, to the trustees of the Diocese of Cape Town, to be invested by the Diocesan Finance Commission for the use of the Sick and Aged Clergy Fund of the English Church in South Africa, if such fund should be at the time still existing; should that fund be not in existence, then the money was to be invested for the benefit of such Diocesan Fund or work as the Lord Bishop for the time being might determine. To his wife, the testator bequeathed all his household furniture, jewellery, and personal effects, and to his eldest son, Geoffry Norvill, his books and mahogany book-case.

The applicant applied to the Master for letters of administration as executor, but he declined to issue letters, on the ground that the will did not conform with the provisions of the law regarding the attestation of wills.

The witnesses to the will filed an affidavit, in which they deposed that they were well acquainted with the handwriting of the deceased, and that his will had been written throughout by him.

One of the witnesses deposed that after the execution of the will the deceased told him that he had drawn his own will.

Mr. Meltano was heard in support of the application, and referred to the following cases: *Executors of Eaton v. Eaton* (Buch. 1875, p. 178) *De Wet's Case* (Buch. 1875, p. 119) and *Steer's Executor v. The Master* (5 Juta, 313).

The Court, following *Steer's Executor v. The Master*, granted the application, but remarked that the Master was quite justified in refusing to grant letters of administration until the Court had determined whether the will was a holograph will or not.

[Applicants' Attorney, W. E. Moore.]

SAMUEL V. BARNATO BROS.

The trial of this case was ordered to be postponed until the August term.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte BENJAMIN. { 1898.
Apr. 25th.

Mr. Molteno moved for the admission of Mr. Louis Edmund Benjamin as an advocate.

Mr. Benjamin took the oath and was duly admitted.

JOHNSON V. POWELL'S { 1898.
EXECUTORS. { Apr. 25th.

Executors—Claim for services rendered to the deceased—Refusal to admit—Evidence—Interdict.

The Court approved of the action of executors in refusing to admit a claim of £815 alleged to be due in respect of services rendered to the deceased in the absence of proof of the bona fides of the claim, and refused to grant an interdict restraining the executors from selling certain landed property in the estate claimed by the applicant, leaving him to his remedy in damages in the event of his establishing his claim.

This was an application upon notice calling upon the respondents (the executors testamentary in the estate of the late John Powell) to show cause why they should not be interdicted from selling or otherwise disposing of the farm Diepfontein, in the division of Fraserburg, pending an action about to be instituted by the abovenamed applicant for transfer to him of the said farm in terms of an agreement between himself and the said John Powell.

The applicant, who is a nephew of the deceased, alleged in his affidavit that in the early part of 1886, at which time he was studying medicine in Dublin, he received a letter from his uncle, who was then farming in this colony, asking him to come out and take charge of the farm Diepfontein, in the division of Fraserburg, for a period of four years, at the expiration of which time he promised to give him (applicant) the said farm.

That in consequence of this he gave up the idea of becoming a doctor, left Ireland on the 7th August, 1886, arrived in the Colony towards the end of that month, and proceeded forthwith to Diepfontein and commenced his duties as superintendent, being left in charge by his uncle, who was then living in Swellendam.

That from that time up to the present the applicant has been in charge of the said farm.

That when he first went to the farm there was scarcely any live-stock upon it, but shortly afterwards he bought 80 sheep on account of his uncle, this number was added to by increase thereafter from until it reached 1,800, but in times of drought it was very much reduced.

It was applicant's duty to take charge of these sheep, to sell the wool, and sometimes some of the sheep, and at the end of every twelve months he accounted to his uncle for the profits of the farm.

That during the whole time he was serving his uncle he only received his bare board and lodging, but had never received any other payment for his services, nor did he claim any, in view of the agreement under which his uncle was to make over the said farm to him whenever he might so desire.

That not long before his death, and some time prior thereto, applicant's uncle held out hopes of giving him a better farm in lieu of the place Diepfontein.

That applicant's uncle was suffering from diabetes in the year 1891, and in the latter part of that year he left this colony and proceeded to Jersey, and whilst there appears to have recovered, but that afterwards, as applicant was informed, he proceeded with his wife to Dublin, where they both contracted influenza and died within a few hours of each other.

The applicant said that his uncle having died without having fulfilled his promise of giving him transfer of the farm, and without having left any directions to his executors as to the carrying out of his agreement in respect thereof, applicant filed a claim for services rendered which the said executors refused to entertain.

Applicant finally said that the farm Diepfontein had been advertised for sale on the 5th May.

Mr. C. H. van Zyl (of the firm of Van Zyl & Buissinne), one of the executors, in his answering affidavit to the above, alleged *inter alia* that he had received several letters from the applicant, but that he never at any time claimed the farm Diepfontein.

That when applicant wrote to deponent's firm he made a claim on the estate for services rendered, and deponent requested him to specify it. He did so by letter and account, dated 2nd December, 1892. In this account he claimed £815 for services rendered, and in his letter he said *inter alia*: "Kindly let me know if you will let Diepfontein and Vry Kolk for six months or one year, and what your price is."

Being doubtful as to the claim, and having no evidence of any kind in proof or in disproof thereof, deponent asked the applicant for proof and for an affidavit in support of such proof, when he sent two affidavits and the account.

Deponent further said that as he could find no

trace or evidence of any kind to support in any way the claim of the applicant he sent him the letters, copies of which were annexed to the affidavit. Since the last letter, dated 2nd March last, applicant had made no further claim till the present proceedings.

Deponent further said that in the beginning of March last he gave Mr. Attorney Van Eyk, of Sutherland, authority to sell by public auction the farms and stock, and that he (Van Eyk) informed deponent thereafter that in settling the advertisements of the sale, including Diepfontein, he was assisted by applicant, who also fixed the date of the sale. Deponent further said that in the absence of any books, correspondence, or vouchers of the deceased, and of any documentary or independent evidence, he was not justified in accepting and ranking the applicant's very large claim; and that, as stated, he had not till now made a claim for the said farm.

Deponent lastly said that the applicant had not produced, or offered to produce, the letter of the deceased referred to in his affidavit, nor had he adduced to deponent or offered to produce proof that the deceased intended to give him a better farm in lieu of Diepfontein.

The applicant, in an answering affidavit to the above, alleged that his reason for not claiming the farm in his correspondence with the executors was that he had been informed by his brother, who was one of the executors, that he had no right to the farm as nothing was said about it in the will of his uncle, but that he (applicant) was entitled to claim for his services as manager of the farm.

Mr. Searle was heard in support of the application.

Mr. Shell for the respondents.

The Chief Justice said: The executors were quite justified in refusing to admit the applicant's claim upon such slender evidence. He had ample time to send for the letter referred to in his affidavit since the death of Mr. Powell. The reason now given for not sending for it was that he did not believe that he had any claim under the letter, inasmuch as the will said nothing about the alleged agreement. There was no explanation as to why he believed he had now a claim, and why he did not know it before. I am quite satisfied that if the letter was of such importance applicant would have brought it with him, but on his own admission he left it in Ireland and never sent for it. His whole conduct too was inconsistent with any such claim. He first of all claimed for services, then he asked for a lease of the farm, and actually assisted Mr. Van Eyk in making preparations for the sale of this very farm. Upon the whole there was not sufficient ground for the application, but if this letter were afterwards forthcoming the applicant would at all events be entitled to substantial damages if he

could shew that there was a definite promise of the kind made by his uncle. In the meantime that promise was not admitted and not proved, and the application must be refused with costs.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

IN THE ESTATE OF THE LATE
LUCAS D. S. VAN VUUREN } 1893.
AND SURVIVING SPOUSE. } Apr. 25th.

Mr. Watermeyer moved for authority to the executrix testamentary to raise a loan on mortgage of the landed property in the said estate, for the purpose of paying the debts thereof, to enable her to retain the farm for the support of herself and her five children, three of whom were minors. The liabilities of the estate were £817 11s. 8d., and it was desired to raise a loan of £800. The Master had reported that it would be for the benefit of the minors if the Court granted the application.

The Court granted the application on the terms suggested by the Master, that the executrix should bind herself to pay the interest on the loan.

IN THE MATTER OF ARTHUR NICHOLSON, AN
ALLEGED LUNATIC.

Mr. Graham applied for the postponement of the hearing of the proceedings *de lunatico inquirendo* from the 1st to 2nd May, for the convenience of witnesses attending from the Robben Island Asylum.

Mr. Molteno, the *curator ad litem*, consented, and the application was granted.

KEENAN V. KEENAN. } 1893.
} April 25th

Rule nisi—Return day—Fresh service—Practice.

Where on the return day of a rule nisi in an action for divorce on the grounds of malicious desertion, the case was not put on the list in consequence of the affidavit of non-compliance with the order of Court not having been filed by the plaintiff, the Court, on a subsequent application, supported by the necessary affidavit, for dissolution of the marriage, ordered the return day to be extended and fresh service to be effected on the defendant.

Mr. Shell moved for the dissolution of the marriage existing between the parties by reason of the defendant's failure to obey the order of Court for restitution of conjugal rights.

On the 28th February last the Court granted a decree of restitution of conjugal rights, the

defendant to return to or receive his wife on or before the 1st April, and failing compliance with such order, to show cause on the 12th April why a decree of divorce should not be granted.

On 12th April, the plaintiff not having filed the necessary affidavit as to non-compliance with the order, the matter was not mentioned in court, but application was now made for the dissolution of the marriage, the necessary affidavit having since been filed.

The Chief Justice said all the Court could do at present was to extend the return day to the 16th May, and in the meantime there must be a fresh service of the order on the defendant.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinne.]

WOLFF V. WOLFF.

Mr. Sheil moved for a rule nisi requiring the respondent to show cause why applicant, his wife, should not be admitted to sue him *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce.

The Court granted the order, the rule to be returnable on the 16th May.

IN THE ESTATE OF THE LATE SCHUSTER.

Mr. Sheil moved for leave to the executors to sell a certain piece of land at the corner of Strand and Buitengracht-streets, the buildings thereon being in a ruinous state and producing no revenue, and funds being needed to discharge the liabilities of the estate. The Master had reported that it would be for the benefit of the heirs to sell the property.

The Court granted the order.

WISSE V. MOSTERT. { 1893. Apr. 25th

Discovery—Rule of Court 333 (b)—Party to an action—Practice.

A person becomes a party to an action within the meaning of Rule of Court 333 (b) as soon as the summons has been issued.

This was an application upon notice calling upon the respondent to show cause, if any, why a certain order of Court, granted in Chambers by the Hon. Mr. Justice Buchanan on the 18th April, should not be set aside on the following grounds:

(a) That the said order was improperly obtained, as all information in connection with the matters in dispute between the parties had not been supplied to the judge in Chambers.

(b) That the plaintiffs' declaration had not yet been filed.

On the 18th instant the defendant's attorneys obtained the order above referred to, by which

the plaintiffs were ordered to make discovery on oath of all documents in their possession or power relating to the matters in dispute between the parties.

Mr. Juta now appeared for the applicants (plaintiffs), and moved that the order be set aside. He contended that a defendant could not under Rule of Court 333 (b) claim discovery until the plea had been filed. It was a fishing application for the purpose of framing a defence, and there was no precedent for it either by our practice or by English practice. He referred to the English practice of discovery.

Mr. Searle, [for the defendant, submitted that the order referred to in the rule was granted by the judge as a matter of form, having been satisfied that an action had been commenced. All documents must then be scheduled, but the party against whom the order has been made may object to produce on sufficient cause shown. It is for the Court to decide whether the cause is sufficient *Shaw v. Batchelor* (ante p. 118). Our rule was much wider than the English rule, and gave the judge a much wider discretion.

Mr. Juta replied.

The Chief Justice said: The question of the construction of this particular rule has not previously been before the Court in the way it is now brought up; but after careful consideration I am of opinion that sub-section (b), Rule 333, means that any party to an action is entitled to obtain such an order as is there mentioned from a judge. The only question then is, when does a person become a party to an action? The answer is as soon as the summons is issued; proceedings then commence, and the other party may then under this rule apply to a judge for an order directing the other party to the action to make discovery on oath of the documents which are or have been in his possession or power relating to the cause of action. Then it lay upon the person against whom the order was made to show cause why the order should not be carried out, and in the present case if the applicants had satisfied the Court that they would have been prejudiced by this order being enforced, or that the application was really in the nature of a fishing application on the part of the defendant, then there would have been sufficient cause why that order should not be carried out. But they have failed, in my opinion, to show either of these things, and the application must be refused with costs.

Mr. Justice Buchanan said: When the application was made in Chambers I was under the impression that pleadings should first be filed, but on looking at the rule it seemed to me that the order should be granted as a matter of course.

Mr. Justice Upton concurred.

[Applicant's Attorney, P. M. Brink; Respondents' Attorneys, Messrs. Fairbridge & Ardenne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte BARBER. { 1893.
{ May 1st.

Mr. Graham moved for the admission of Mr. Sydney Hilton Barber as an advocate.

Mr. Barber took the oath and was duly admitted.

PROVISIONAL ROLL.

DE VILLIERS V. GROVE.

Mr. Maskew moved for the final adjudication of defendant's estate.

Decreed.

KLEYN V. ROUX.

Mr. Maskew moved for provisional sentence upon two unsatisfied judgments.

Granted.

LIND V. BEKKER.

Mr. Shell asked for the discharge of the provisional order of sequestration.

Granted.

VAN DER SPY AND ANOTHER { 1893.
V. ALBERTS. { May 1st.

Mr. Schreiner, Q.C. (with him Mr. Juta), moved for the final adjudication of the defendant's estate as insolvent.

The debts of the petitioning creditors amounted to £72 and £50 respectively.

Mr. Searle appeared for the defendant to oppose and read her affidavit, in which she disputed the first account, and alleged that there were funds sufficient to meet the second.

She further asserted that she had been misled into filing her schedules; that all her assets were in the possession of one of the plaintiffs; and that if proper accounts were made out they would show that she had a credit balance of £180.

The Chief Justice said if the defendant's statements had been consistent throughout then the Court would have attached some weight to the statement now made that she had been misled into filing her schedules and the affidavits mentioned. But her statements could not by any possibility be reconciled. At one time she owed nothing to Kaplan; at another she did. At one time she sent in her schedules as being insolvent; at another she was perfectly solvent. The Court was therefore of opinion that it would be for the interest of creditors and all concerned that the

sequestration should now go on, but it would be advisable that an independent trustee should be appointed in order to thoroughly scrutinise the accounts. The order would be granted, with costs against the estate.

CHAMBERLAIN V. NEL.

Mr. Molteno moved for provisional sentence for £212, together with interest from 1st July, 1891 at 5 per cent., less £28 already paid.

Granted.

JONES V. WILLIAMS.

Mr. Graham moved for judgment under rule 829 for the sum of £8. Defendant was in default.

Granted.

GOLDSWORTHY V. GOLDSWORTHY. { 1893.
{ May 1st.

Judicial separation—Husband and wife—
Ill-treatment—Habitual intemperance—
Custody of child.

Ill-treatment which, by itself, is not sufficiently serious to entitle a wife or husband to a decree of judicial separation would, if accompanied by habitual intemperance, entitle her or him to such a decree.

A wife who obtained a decree under such circumstances declared entitled to the custody of a child, a boy, of the marriage until he attained the age of at least seven years, with leave to the husband to apply for further directions at the end of that time and with liberty of access to the child, in the meantime, at all reasonable times and places.

This was an action for judicial separation *a mensa et thoro* at the instance of Janie Stewart Goldsworthy against her husband, Major Goldsworthy, on the ground of ill-treatment.

Mr. Giddy appeared for plaintiff, and Mr. Schreiner, Q.C., for defendant.

The declaration alleged that the acts of ill-treatment complained of took place in 1892 and up to March, 1893.

A decree of judicial separation was prayed for, and the custody of the child of the marriage.

The plea denied the acts complained of, and prayed that plaintiff's claim might be dismissed with costs.

Janie Stewart Goldsworthy (née Mann), plaintiff, deposed: I came out from England and was married to Major Goldsworthy at Rondebosch on 22nd November, 1890. There is one child—a son—born of the marriage. My husband was not a man of means. He had a certain salary. After

the marriage I discovered he was in debt. I received £500 from my father to meet Major Goldsworthy's difficulties. I subsequently drew two drafts—one of £20 and another of £40—on my father. Besides that, I have had to guarantee accounts for Major Goldsworthy. My indebtedness on his account is about £800. About the year 1892 he began to be unkind to me, and at the beginning of this year he ordered me out of the house, and struck me on the head with a wet bath towel and with his open hand on the face. I had told him I was going to my sister's house—that was the only provocation he received. He had previously insulted me before the servants, and before certain visitors. On one occasion a woman visited the house at Major Goldsworthy's invitation, and as I had no servants I had to cook and serve dinner to her. I ordered this woman from the house, and he was very angry. On another occasion I wanted to go to my sister's house, and he shut me in my room and kept the door closed. Afterwards he left the door and I escaped through the garden, but on running away he caught hold of me by the wrists and dragged me back a considerable way. I cried "Murder!" My sister came. He let me go then. He was not sober. My sister and I went to her house, but Mr. Davidson refused us admittance; so we remained out all night. Under my father's will he left me an annuity which after my death passes to my son. Major Goldsworthy repeatedly asked me to contest the will. I declined. He afterwards was very unkind to me. Once he threw me down on my bed and caught hold of my throat. On another occasion he threw a tumbler and two chairs at me. One of the chairs struck me on the arm. I am now working for my own livelihood. The household furniture had been settled on me, but was sold to pay the rent.

Cross-examined by Mr. Schreiner, Q.C.: We first lived in Schoonder-street, and as I wanted to be near the sea we removed to Sea Point. That entailed a double rent—for the house in Schoonder-street and the house at Sea Point. Major Goldsworthy owes my father £480. I signed a document for £150 for furniture from Isaacs. When I arrived I thought the furniture was paid for, but when I found that it was not I signed the document. I also signed a document for £60 due by my husband to Raphael. I had an interest in a farm in East Griqualand, amounting to the value of £80, given me by my father. That £80 I received in 1892. My husband was ill in August, 1892. I thought he was shamming. I insisted that he should go to work, as the doctor had told me to advise him to go to his duties. He was in the Government service. I know Mr. Davidson, who is my sister's husband. He did not know my relations with my husband. Mrs. Davidson is my eldest sister. She came here in

January last to join her husband. My husband sent me to town in all weathers. I have frequently had to walk into town in the rain, having no tram fare. My husband told me my relationship with my sister must cease. Mr. Davidson forbade me his house, and Major Goldsworthy forbade my sister to come to our house. Major Goldsworthy said my sister and I were in a conspiracy against him and Mr. Davidson. I repeat that my husband struck me in my bedroom in February of this year. Major Goldsworthy had a considerable wine bill every month—considerable for our means. He insisted that I should not go and see my sister. He struck me with his clenched fist on the head. There was no mark. I did not require to consult a physician. I don't remember which side of the head. I was not knocked down. I was not made insensible. He said he would rule me with a rod of iron, and lead me a dance if I persisted in visiting my sister. On the occasion of the dinner referred to, I was working in the kitchen and could not have sat down at table. When he threw the tumbler at me the tumbler struck the lower part of my dress and broke on the floor. He sometimes threatened to throw a plate at me. He forbade the servants to obey me. I left the house on account of Major Goldsworthy's cruelty. I was afraid to live any longer with him. In a note I said "I was leaving to protect my sister." My sister has filed an action against her husband for divorce. I do not wish to go back and live with Major Goldsworthy. I wish the custody of the child.

Re-examined: The servants would not stay because they were not paid their wages.

By the Court: The child is one year and eight months old. I do not believe Major Goldsworthy is a fit and proper person to look after the child. Rather than part with the child I would go back to Major Goldsworthy.

Mary Davidson, sister of the plaintiff, deposed that she had known Major Goldsworthy since she came to the Colony in January last. She took kindly to him for ten days. Her sister had not told her anything then. Before leaving England she was aware that Major Goldsworthy had caused her father great annoyance by making her sister write for money. Subsequently she learned from her sister the condition of their finances, and about the conduct of the Major. Witness corroborated plaintiff's account of the affair in the garden, and with regard to the night on which she and her sister were locked out, said they spent part of the night on the beach and part in the garden.

Cross-examined: Mrs. Goldsworthy came very often to witness's house and had meals. Witness had come out from Scotland to join her husband as a loving wife. Her husband was a clergyman of the Church of England, and was at present a teacher. She did not come out to conspire with

her sister with a view to a dissolution of both marriages. She had not been the cause of the disunion between Major Goldsworthy and his wife. One night her sister came down to the house in her nightdress. She had come down because she was afraid of the Major. The Major came into the garden, and said Mrs. Goldsworthy was the worse for liquor.

Major Josiah Webbe Goldsworthy, defendant, deposed: I married Mrs. Goldsworthy in 1890. When I came down here from the Frontier I owed no money save £180 to plaintiff's brother, and of that I paid back between £70 and £80. I was recruiting for the Bechuanaland Border Police. In May, 1891, plaintiff's father lent me £400 at 5 per cent. interest. I was then somewhat embarrassed. Up to the time when Mrs. Davidson arrived in the Colony my wife and I had lived happily together. I had been ill for about twelve months, and was attended by Doctors Thomas and Piers. When Mrs. Davidson arrived I was left very much to myself, and had often to cook my breakfast and dinner myself, and sometimes to sweep out the drawing-room. My wife was too much occupied with her sister. On the occasion when my wife appeared in Mr. Davidson's garden in her nightgown, I may state that she did it wilfully, and I entreated her to stay at home, but she refused. She insisted on going down in her bare feet and a flannel gown. That was about a quarter to ten. I tapped at Mr. Davidson's window. I wanted to tell Mr. Davidson all about this fuss, and I wanted to get him to write a note to my wife forbidding her his house.

The Chief Justice: Why did you tap at the window?—Because I knew it was Mr. Davidson's room.

Continuing, witness denied that he had ever struck his wife, that he had ever shut her up, that he had taken her by the throat or dragged her by the wrists. On one occasion, he added, when she wanted to run away to her sisters, I said "What? Going again?" and held her by the elbows, and she dropped on the bed. I never threw a chair at her. On one occasion, when she wanted to run away to her sister, I told her that any other husband would rule her with a rod of iron. I was so disgusted that I brought the chair I was holding down on the floor with a bang. It did not come near her. My wife left me on the 9th March. That evening she came to me and asked me if I would take care of the little boy. I told her it was her duty to do that, and asked "Where are you going?" She said, "To my sister's." She went away and left a note, and afterwards took the child away. I have nothing to say against my wife. She has been a good wife to me. I am willing and ready to take her back. She has done a lot of awkward work for me. With regard to the allegation about intem-

perance, I have been five years in South Africa and no man has ever seen me the worse for liquor. I always know where to draw the line.

Cross-examined: I was, until recently, in the Defence Department, at a salary of £120. I received £150 for being adjutant of the Dukes. I had also a sovereign a head for the recruits I got for the Bechuanaland Border Police. I was offered a salary of £120 as a clerk in the Colonial Office. I refused to accept that position as I would have been obliged to have served under a man who had served under me as a non-commissioned officer. My wife advised me not to accept the post. I have nothing to say against my wife. She has done a great deal for me. I have not paid the rent for the Sea Point house. I believe the amount due is £80. I think there were only two servants who did not receive their wages. I never once called my wife insulting names. On the occasion on which the lady referred to was at dinner, I, as well as my wife, waited on her.

By the Court: He had nothing to do at the present moment. His irritability was caused by his financial embarrassments. He had been formerly married, and had a daughter by his first wife. She was now eighteen years of age.

John Davidson, clergyman of the Church of England, deposed that he was married to Mrs. Goldsworthy's sister. His wife came out from Scotland to join him. He was now a teacher. He had not asked his wife to come. At first the two families got on very well together. Afterwards the wives were seeing too much of each other, and witness forbade Mrs. Goldsworthy coming to the house. He had heard about the alleged cruelty. Mrs. Davidson had been deceitful. When witness's wife arrived in Cape Town she said to witness, "I don't know how I'm to meet the Major." She was referring to the money difficulties. When she did meet him, she threw her arms round the Major's neck, kissed him, and said, "How are you, Harry?"

Cross-examined: I had been in two curacies in England and I decline to say why I left them. The Major was not an intemperate man. He took his liquor, but he was not intemperate.

By the Court: So far as his personal knowledge of Major Goldsworthy was concerned he had never seen him what he would consider under the influence of liquor.

Dr. Piers, who attended defendant from May, 1892, to January, 1893, said he was suffering from gastric catarrh. He had seen a good deal of both parties to the suit. They appeared to be an affectionate couple. He had never seen Major Goldsworthy under the influence of liquor.

Cross-examined: It was possible that gastric catarrh might be due to heavy drinking, but it was not the usual cause.

Jim Roberts, a coloured boy, deposed that he had worked for Major Goldsworthy for one year and nine months. Major and Mrs. Goldsworthy were on good terms.

Cross-examined: Major Goldsworthy owed him his wages.

Mr. Schreiner then addressed the Court on behalf of the defendant, and strongly urged that the present case should not be decided until the evidence had been heard in *Davidson v. Davidson*, when it would appear that Mrs. Davidson was the real cause of the disunion between Major Goldsworthy and his wife. In any case sufficient evidence of cruelty had not been given to justify the Court in granting a decree of judicial separation.

Mr. Giddy was not called upon.

The Chief Justice in delivering judgment said: If the Plaintiff's claim were based upon personal ill-treatment alone on the part of the defendant the evidence would not be sufficient to justify a decree of judicial separation. But such ill-treatment as was proved was greatly aggravated by his habitual intemperance which has been clearly proved.

A wife or husband might reasonably be expected to bear with occasional outbursts of ill-temper, provided they are not accompanied by serious personal violence, but occasional assaults, however slight, accompanied by habitual intemperance would make co-habitation intolerable.

The decree will therefore be granted and the plaintiff declared entitled to the custody of the child, a son, of the marriage until, at all events, he has reached the age of seven years. At the end of that time the defendant may apply for further directions as to such custody, and in the meantime he must have liberty of access to the child at all reasonable times and places.

Their lordships concurred.

[Plaintiff's Attorney, D. Tennant, jun.; Defendant's Attorney, J. C. Berrangé & Son.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

MILNE'S TRUSTEES V. NICOLSON. { 1898.
May 2nd.

De lunatico inquirendo—Dangerous lunatic
—Act 20 of 1879, section 2—Detention—
Discharge.

This was an action to have the defendant declared of unsound mind, and incapable of managing his person and property.

Mr. Graham appeared for the trustee, and Mr. Molteno as *curator ad litem*, for the alleged lunatic, Arthur Nicolson, who was himself in court.

Dr. Impey, surgeon-superintendent of Robben Island Asylum, deposed that Nicolson was admitted on 26th July, 1891, and had been previously in the Old Somerset Hospital. He was at present suffering from chronic mania with delusions. He was not now dangerous. Witness thought that there was no chance of his complete recovery. He was thirty-one years of age. He was not capable of managing his own affairs.

By Mr. Molteno: Nicolson had various delusions. One of his delusions was that he was a very clever man, and that his wisdom was derived from the sun. He related that on one occasion while walking through the fields in the Free State the sun whispered to him, and he looked up and saw a shadow gradually falling over his face, and this shadow now enabled him to look at the sun, whence he received his inspirations. That was his particular delusion. He was at present confined with criminal lunatics, being detained under Act 20 of 1879, section 2.

Mr. Molteno asked the Court to find that Nicolson was of unsound mind, but not a criminal lunatic.

Dr. Fuller, who had examined Nicolson, corroborated Dr. Impey's evidence.

The Court ordered that the defendant be discharged from confinement as a dangerous lunatic, and further declared him to be of unsound mind and incapable of taking care of his person or property, and appointed Dr. Impey, or the superintendent for the time being of Robben Island Asylum as curator of his person, and W. A. Currey as curator of his property.

[Plaintiffs' Attorney, G. Montgomery Walker.]

LARY V LARY. { 1898.
May 2nd.

This was an action for restitution of conjugal rights, failing which for divorce.

Mr. Molteno appeared for plaintiff; the defendant was in default.

Petronella Johanna Lary deposed that she was married on 4th April, 1882. There were two children of the marriage. She lived with her husband for three years, when he deserted her. She did not know where he was now. She wished to have the custody of the children, who were now with her.

The Court made the order for restitution of conjugal rights with costs, and ordered defendant to receive or return to plaintiff on or before 1st June, failing which the Court would grant the rule nisi calling upon defendant to show cause by 12th June why a decree of divorce should not be granted, same publication as before; and plaintiff meanwhile to have the custody of the children.

[Plaintiff's Attorney, O. C. de Villiers.]

REHABILITATIONS.

On motion from the bar, the following insolvents were granted their rehabilitations: William Arthur Morton, Paul Dietzsch, D. J. Naude, jun., A. W. N. Cloete (surviving spouse of Daniel Cloete), D. J. Petzer, G. J. Russouw, J. A. son, A. J. Louw.

IN THE ESTATE OF THE LATE JOHN CAMPBELL.

Mr. Barber moved for leave to the executrix to raise a sum of money on mortgage of the farm Vuren Kraal, in the district of Willowmore, to enable her to satisfy a debt contracted by petitioner, the heirs of the estate having consented thereto.

The Court made the order.

VISSEB V. ASWEGEN. { 1898.
May 2nd.

Arbitration—Award—Tender—Rule of Court

This was an application on notice calling upon the respondent to show cause, if any, why a certain award of arbitrators under Act 15 of 1891, section 5, adjudging the respondent liable to pay the applicant the sum of £26, in connection with the erection of a certain wire fence between the properties of the parties, the applicant to pay the costs of the arbitration, except costs between agent and client, should not be made a rule of Court.

The respondent repudiated the award, and refused to submit to it, on the ground that he had no opportunity of having his case heard or argued before the arbitrators.

The facts as appeared from the affidavits are as follows:

Both parties reside in the district of Hanover, and are the owners of adjoining properties. Last year the applicant erected a wire fence between his farm and the respondent's.

The respondent was called upon to pay part of the cost of the fence, and tendered £26. This, however, the applicant refused to accept, and the matter was referred to arbitration under section 5 of Act 15 of 1891.

On the 25th July last the arbitrators, umpire and parties to the deed of submission inspected the ground and fence, and it was arranged that the arbitrators and the parties should meet in Hanover on 29th July to have the matter decided.

The respondent went to Hanover on the afternoon of the 28th July so as to be in time for the meeting appointed for the following day. The arbitrator appointed by the respondent arrived in Hanover on the morning of the 29th July at about nine o'clock.

On the 28th July the respondent's agent (De Villiers) was ill, and could not be seen by his client; but as the latter was passing the office of the applicant's agent (Nathan) on the morning of the 29th July about seven o'clock, the agent informed him that the matter had been settled, that he (respondent) had to pay £26, and that the applicant had to pay the costs.

The respondent then and there expressed his surprise that the matter could have been settled and determined before the arrival of his arbitrator without giving him (respondent) an opportunity of leading evidence or having his case argued.

Almost simultaneously with the arrival of respondent's arbitrator in Hanover, on the morning of the 29th July, the applicant and his arbitrator left for their homes, but before leaving they gave him to understand that the whole matter had been settled, that applicant's arbitrator had signed the award, and that all he had to do was to sign the award also.

Immediately after this conversation applicant and his arbitrator drove off, and respondent and his arbitrator went to the office of applicant's agent (Nathan), and the latter informed him that he had seen the respondent's agent (De Villiers) on the previous evening, and that he was quite satisfied with the terms of the award.

The respondent's arbitrator then signed the award.

De Villiers in his affidavit alleged, *inter alia*, that Nathan came to see him on the evening of the 28th July, and informed him that the arbitration had been settled, that respondent had to pay £26, and applicant the costs of the arbitration excepting respondent's costs between agent and client.

That he believed from what Nathan told him

that the arbitrators had not considered it necessary to meet the agents, that the arbitrators had given their decision on the ground, and had already put their award in writing and signed the same. That Nathan did not inform him that respondent's arbitrator would only arrive next morning, or that there was any understanding as to a meeting of the parties concerned, at nine a.m. the next day, and it was only after he had interviewed the respondent's arbitrator that he (De Villiers) discovered that he had been misled by Nathan.

The case for the applicant was that the award was made by the arbitrators at the meeting on the ground on the 25th July, and that no other meeting of the arbitrators was appointed.

Mr. Joubert now moved that the award be made a rule of Court in terms of the deed of submission.

Mr. Sheil, for the respondent, opposed, and contended that the proceedings were wholly irregular, as the rules of procedure had not been observed. The arbitrator appointed by the respondent would not have signed the award but for the deception practised upon him by the agent Nathan.

The award should be set aside. He cited "McDonald & Co. v. Gordon & Co." (1 R., 251) and "Croll & Co. v. Kerr & Brehm" (2 Searle, 227).

The Chief Justice said: I quite agree with the learned counsel for the respondent that the rules of procedure have to be observed by arbitrators as carefully as by Courts of Justice, because upon the due observance of those rules depends the proper administration of justice. In the present case, I am unable to see that any rule of procedure has been neglected. A tender of £26 was made by the respondent, and that tender has never been withdrawn. It was a very proper thing for the arbitrators to notice that the plaintiff did not insist upon more than £26, and judgment was given for that amount. That was substantially what was done. There was a minor matter as to costs, but that was not the question in dispute. On the whole, I do not think there has been such neglect of the rules of procedure as to justify the respondent in objecting to the award being made a rule of Court. The award would therefore be made a rule of Court with costs of opposition. The fact that the respondent did not tender any evidence before the arbitrators before he signed the award showed that he did not go there to dispute the amount of £26.

Their lordships concurred.

[Appellant's Attorney, C. W. Herold; Respondent's Attorneys, Messrs. Van Zyl & Buisson.]

CROSS, N.O. V. QUIN'S EXECUTOR. { 1898.
May 2nd.

Mr. Rubie, on behalf of defendant, applied for leave to sign judgment against the plaintiff by

reason of her failure to proceed with her action, and for costs.

Granted.

KLEYN V. ROUX.

Mr. Maskew moved to make absolute a rule nisi attaching so much of a legacy due to respondent out of the estate of the late Gabriel D Roux as shall be sufficient to satisfy applicant's judgment obtained in the Court of the Resident Magistrate for Caledon in 1884, and for which the respondent has been summoned in this Court.

Granted.

DE BOT V. DE BOT.

Mr. Buchanan moved to make absolute the rule nisi for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights, and to declare applicant entitled to the custody of her children.

Granted.

Ex parte FLURIAN.

Mr. Schreiner, Q.C., moved, on behalf of the petitioner, for leave to sue in her own name in an action against the Colonial Government for damages for injuries sustained through negligence on the part of Government servants while petitioner was travelling on the Eastern system of railways.

Counsel informed the Court that petitioner's husband had not been heard of for fourteen years, and under these circumstances she was entitled to sue in her own name, both by our law and by French law.

The Court granted the order.

REYNDERS V. REYNDERS.

This was an application for leave to applicant to sue in *forma pauperis* in an action against his wife for divorce by reason of her alleged adultery.

Referred to Mr. Barber.

LOUW V. DE VILLIERS. { 1898.
May 2nd.

Mr. Schreiner, Q.C., for applicant; Mr. Searle for respondent.

This was an application for an order directing the respondent to repair and restore to its original state the water pipe and tap removed by him, whereby applicant's supply of fresh water for domestic and other purposes, for property known as Nantes, Lower Paarl, is interfered with; and for an interdict restraining the respondent from tampering with the said pipe pending an action for a declaration of rights in the matter.

After hearing counsel, the Chief Justice said that with respondent consenting to applicant's mending the pipe the interdict would be refused, applicant undertaking to bring his action for a declaration of rights forthwith. Costs to be costs in the cause.

BERRY V. BERRY.

On the application of Mr. Molteno, a rule nisi was granted calling upon defendant to show cause why plaintiff should not be allowed to sue him *in forma pauperis* in an action for restitution of conjugal rights, falling which for divorce.

PERFECT V. PERFECT.

Mr. Graham, on behalf of plaintiff, moved for leave to sue defendant *in forma pauperis* in an action for divorce on the grounds of defendant's alleged adultery.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

TURNBULL V. GARLICK. { 1898.
May 8rd.

Ejectment—Lease—Rent in Arrear—Notice
—Tender within a reasonable time.

This was an action for ejectment. The declaration alleged that the plaintiff is the registered owner of certain land and premises situated in Plain-street, Cape Town, known as "Elephant House." That in or about the month of September, 1888, the parties entered into a written contract of lease, by which the plaintiff let to the defendant, and the defendant hired from the plaintiff, the above-mentioned premises for a certain period upon certain terms and conditions, and it was provided by the fourth clause of the said contract of lease that should the said lessee be at any time two months in arrear with the payment of the rent of the said premises, the lessor shall have the right, if after application in writing for the rent due it remains unpaid, upon giving due notice thereof to the said lessee in writing, to cancel the lease, anything to the contrary in the lease contained notwithstanding, and without prejudice to his right of recovering any rent in arrear.

The said lease was on the 22nd day of July, 1890, renewed for a further period of five years upon the same terms and conditions,

On Monday, 2nd January, 1898, the lessee was, notwithstanding frequent applications for the rent by the lessor, two months in arrear with the payment of the said rent, and on the said day the lessor made an application in writing to the defendant in terms of the said fourth clause of the said lease for the said rent, and on the 8rd day of January, 1898, the said rent still remaining unpaid, the plaintiff gave the defendant written notice in terms of the said fourth clause that, the said rent not having been paid upon application, the said lease was thereby cancelled. The said lease thereupon became and was cancelled in terms of the said fourth clause, and the plaintiff was and is entitled to have the possession of the said premises, but defendant refuses to quit and give up possession of the said premises, although requested to do so.

The plaintiff claimed:

(a) That the defendant be ordered to quit and give up possession of the said premises, known as Elephant House, and situated in Plain-street, Cape Town.

(b) Alternative relief.

(c) Costs of suit.

The defendant, in his plea, admitted the formal facts, but alleged that no demand for the payment of rent for either of the two months' rent in respect of which he was in arrear on the 2nd January, 1898, was at any time made upon him until the 4th January, 1898, on which day and not before he received two notes in writing, one dated the 2nd and one dated the 8rd January, 1898. That he forthwith tendered to the plaintiff payment of the two months' rent, which the plaintiff refused.

He further pleaded that it was not competent, according to the true intent and meaning of the fourth clause of the lease, to the lessor to cancel the said lease until a reasonable time had elapsed after written demand for payment of not less than two months' rent in arrear.

He tendered the rent due, and prayed that plaintiff's claim might be dismissed with costs.

The replication was general, and upon these pleadings issue was joined.

Mr. Juta and Mr. Buchanan appeared for the plaintiff, and Mr. Schreiner, Q.C., and Mr. Rubie for the defendant.

John Turnbull deposed: I am owner of the premises in question. I entered into a lease with Mr. Garlick in September, 1888. The lease was renewed, and the payments were duly made at the beginning of the month by Mr. Morris, who was in charge of the place for Mr. Garlick. Mr. Kimber succeeded Mr. Morris in the management, and in December last witness called upon the manager for the November rent. The young man in the shop told him that Mr. Kimber had left, and witness was told to call again. He called on 5th December, and the same man, on being asked for

the rent, said he had forgotten it. Witness told him to send up the rent, but he never got it. On 2nd January witness called at Mr. Garlick's at Sea Point, and sent his boy up with a letter asking for the rent. He did not get it. He sent his boy out on the 3rd with a similar letter. On the 4th January the rent was tendered, but he did not accept it.

Cross-examined by Mr. Schreiner, Q.C.: Mr. Dorran, the young man in charge, did not refer me to Mr. Garlick's place of business. During December he never called upon Mr. Garlick. He met him one day. There was some chaff, but no talk about business. Witness did not know that Mr. Garlick was away from home when he called at the house on 2nd January, though he found out that Mr. Garlick was at Kalk Bay. Did not know that on 3rd January Mr. Garlick was at his place of business from ten a.m. to four p.m. The second notice which he sent to Mr. Garlick's house at Sea Point, cancelling the lease, was sent very early on the morning of the 3rd, when he knew Mr. Garlick was at Kalk Bay. On the following day the money was sent.

By the Court: The rent of the shop was £17 a month. That was a fair rent, though he believed he could get more.

By Mr. Schreiner: Witness denied that he wished to break the lease because property had gone up in Plein-street. When he met Mr. Garlick on the road in December, Mr. Garlick asked him how he was, and witness said, "High in spirit but low in pocket."

Frank Turnbull, son of the preceding witness, said he took a letter to Mr. Garlick's house on 2nd January. He gave it to an elderly lady, and asked her to give it to Mr. Garlick. She said Mr. Garlick was at Kalk Bay, but she would give it him when he returned. On the 3rd January he was sent down with another letter. He gave that letter to the gardener.

Mr. Garlick, in reply to Mr. Schreiner, said the first notice of this rent being overdue was received on 4th January, and on that day, between ten and eleven, the money was tendered.

Cross-examined: Mrs. Miller, who received the letter from Mr. Turnbull's boy, was not authorised by witness to receive letters for him during his absence. She did not live in his house. The rent was paid up to the time Kimber left.

At this stage, the Chief Justice said there was no necessity for hearing any further evidence for the defence. No notice was given, and no time was allowed even if notice had been given.

Mr. Juta, for the plaintiff, argued that as the shop in Plein-street was closed on 1st and 2nd January, the only other course open was to serve the notice upon defendant at his private residence.

The Chief Justice said the action must fail on every ground; no due notice had been given in

terms of the contract. Plaintiff's son went to defendant's house, and after knocking for some time a lady, Mrs. Miller, came from another house and he handed over the letter to her. He was then informed by this lady that Mr. Garlick was away at Kalk Bay. The boy told his father that. On the following day another letter was sent. That letter was not delivered at the proper quarter. On the 4th January Mr. Garlick got the letters. His lordship quite agreed with Mr. Juta that that was notice. But what did defendant do? Immediately after getting this notice, at any rate, within "a reasonable time," he tendered the amount, and therefore complied with the conditions of the contract. The proper place to have delivered this notice would have been at Elephant House. There appeared to have been a little sharp practice on the part of plaintiff.

Judgment would be for defendant with costs.

Their lordships concurred.

[Plaintiff's Attorney, W. E. Moore; Defendant's Attorneys, Messrs. Van Zyl & Bussinné.]

COLONIAL GOVERNMENT V. STEVENS AND HOLLINGS-WORTH. { 1898.
May 3rd & 4th.

Resident Magistrate—Jurisdiction—Counter-claim—Compensation.

A Resident Magistrate has no jurisdiction to adjudicate upon a counter-claim for unliquidated damages over £20 in an action in which the plaintiff claims less than £20.

This was an appeal from a decision of the Resident Magistrate for Kimberley in an action in which the present appellants sued the respondents for the sum of £17 8s. 8d., being for the carriage of certain galvanised iron from Port Elizabeth to Kimberley.

The defendants admitted the debt and counter-claimed for £40 (less £2 16s. 4d.) in order, as they alleged, to bring the matter within the jurisdiction of the Court, damage sustained by reason of the plaintiffs' negligence in allowing the goods in question to become wet and damaged and rendered useless to the defendants.

The plaintiffs excepted to the counter-claim on the grounds that it exceeded the Magistrate's jurisdiction.

This exception was overruled.

No exception was taken by the plaintiffs that the claim against them should have been brought in the Supreme Court.

The evidence went to show that a clean receipt was given by the Railway Department in Port Elizabeth for the iron but on its arrival in Kimberley it was delivered in a wet and damaged condition. The evidence was conflicting as to

whether the damage was occasioned by rain water or by salt water.

The Magistrate gave judgment for the plaintiffs in convention for £17 8s. 8d., and for the plaintiffs in reconvention for £84 16s. 6d., the defendants in reconvention to pay costs.

The Magistrate gave the following reasons for overruling the exception:

I considered that the damages pleaded in reconvention could be so pleaded because they arose from the same cause of action, and as the defendants admitted the plaintiffs' claim of £17 8s. 8d. and waived a sum of £2 16s. 4d., the balance of £20, being the only amount in dispute between the parties, fell within the jurisdiction of the Court.

The test of the case would in my opinion be this. The defendants could have instituted an action against the plaintiff for £40 damages, by framing and annexing an account to their summons somewhat as follows: The Cape Government Railways.—Dr. to Stevens & Hollingworth: To damage done to goods whilst in charge of the Railway Department, £40. Cr.—By amount due to Railway Department for carriage, £17 8s. 8d.; ditto waived to bring matter within jurisdiction of Court, £2 16s. 4d. = £20, balance due to Stevens & Hollingworth.

The plaintiff and a defendant making a claim in reconvention are exactly in the same position. "Carlis v. Oldfield" (4 H.O.R., 379), "Scott v. Barnard" (2 C.T.L.R., 256), "Kruger v. Van Vuuren's Executrix" (5 Juta, 162), "Charaley v. Hersley" (Buch., 1878).

From this judgment the plaintiffs now appealed.

Mr. Giddy was heard in support of the appeal, and contended that the counter-claim was clearly beyond the Magistrate's jurisdiction, and the exception should have been sustained. He cited "Dale v. Winship" (2 C.T.L.R., 894), "Scott v. Barnard" (2 C.T.L.R., 256), "Smith v. Ramsbotham" (8 Buch., 98), and "Kruger v. Van Vuuren's Executrix" (5 Juta, 162).

Mr. Searle, for the respondents, contended that there was no difference between the present case and that of "Dale v. Winship," the amount claimed in reconvention was arrived at in the same way. A plaintiff in reconvention is entitled to include the claim of the plaintiff in convention when that claim is admitted.

He cited the cases above referred to, which he discussed at length.

Mr. Giddy in reply.

Cur ad vult.

Postea (May 4th).

The Court delivered judgment.

The Chief Justice said: The plaintiff's claim was for £17 8s. 8d., being the freight on goods carried by railway. The defendants' counter-

claim was for £87 8s. 8d., being the amount of damages alleged to have been sustained by them by reason of damage done to their goods.

If the counter-claim had been in respect of a debt capable of being opposed in compensation, it would have been competent for the defendants to plead compensation to the extent of the plaintiff's demand and by way of counter-claim to claim the sum of £20, which would have been within the Magistrate's jurisdiction.

But a claim for unliquidated damages cannot be pleaded by way of compensation so as to extinguish the debt owing to the plaintiff and therefore the defendants were bound to claim the full sum alleged to be owing to them.

That sum, being over £20, could not be adjudicated upon by the Magistrate in an action in which the plaintiff claimed less than £20.

The case of *Dale v. Winship** does not support the respondents' contention. There the counter-claim was for £20 only, and the practical effect of the case being remitted to the Magistrate was that he could only give judgment for the plaintiff for £16 and for the defendant for £20, with the result that the defendant would obtain no more than £4. The present appeal must be allowed with costs.

Their lordships concurred.

[Attorneys for the Government, Messrs. J. & H. Reid & Nephew; Attorneys for the Respondents Messrs. Findlay and Tait.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN
and Mr. Justice UPINGTON, K.C.M.G.]

HYMAN'S TRUSTEES V. RANDIES. { 1898.
May 4th

Mr. Searle moved for removal of the said cause and the records thereof to the High Court of Griqualand for hearing and determination.

The Court granted the order.

SAMUELS V. SAMUELS.

Mr. Graham, for petitioner, moved for leave to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

Referred to counsel.

IN THE ESTATE OF THE LATE { 1898.
GEORGE PALMER. } May 4th.

Executors—Account—Extension of time within which to file.

Mr. Juta moved for an extension of time to the executors testamentary to enable them to file annual accounts of the estate until they shall be in a position to frame a final account. It appeared, he said, that these gentlemen had been executors for something like eight years, and they had every year been rendering an account to the Master. The result had been that they had been able to save a great deal out of the estate. They were now in a very good position, so much so that they expected to be able to pay out the whole amount bequeathed to the heirs. They had been gradually paying off liabilities, and were trying to get the bond cancelled. It would be for the benefit of the heirs if they would be allowed to render accounts as usual, for some time at least. The heirs were quite agreeable, but if the Court were not satisfied, it might stand over for a fortnight to allow of getting further information.

The Chief Justice said the matter was before the Court now and they must deal with it. The Court thought there ought to be an extension of time to four months, provided a complete account of administration was filed within that period. Of course, if the accounts could not be filed within four months, another application could be made.

WILSON V. COLONIAL GOVERNMENT.

Mr. Graham, for petitioner, moved for leave to sue *in forma pauperis* in an action against the Colonial Government for recovery of damages for wrongful dismissal from his employment as an engine-driver.

Referred to counsel.

In re SOUTH AFRICAN BANK. { 1898.
} May 4th.

Bank in liquidation—Report—Books—Inspection.

Mr. Juta applied for an order in terms of the fifth and final report of the official liquidators. The report, he said, had been open for inspection for the usual period, and notice had been duly given. It pointed out that certain moneys were in hand—some £242—and the liquidators asked for an order for the dissolution of the company with authority to destroy the books and documents.

Mr. Searle, on behalf of Hendrik R. Stephan, presented a petition for an order requiring the official liquidators to deliver over to petitioner all books, papers, documents,

bills, and promissory notes of the South African Bank, and also two promissory notes of David H. Benjamin, to enable petitioner to recover payment of the claims purchased by him from the said liquidators. The official liquidators of the bank on the 25th March caused to be sold all the bank's right, title, and interest to any claim against any estate or person on account of bonds, promissory notes, or open accounts on claims filed against insolvent, assigned, or deceased estates, in addition to certain promissory notes overdue, amounting to £8,071 1s. 7d. Petitioner purchased the same for £95, and he now asked that the liquidators should hand him over the books and other documents.

Mr. Searle was heard in support of the application.

The Chief Justice: We cannot allow these books to get into the hands of strangers. If the liquidators would keep them in their custody there would be no objection to let applicant see them for the special purposes of investigation.

Mr. Juta said the liquidators had no objection whatever, but who was to pay the rent for the safe custody of the books.

The Chief Justice: Mr. Searle, unless you can undertake to pay the rent we will order the destruction of the books.

Mr. Searle said with regard to certain promissory notes, information would be obtained from the cashier of the bank, and if they could find that the promissory notes were amongst the assets of the bank they should be handed over. The rent would be paid by applicant.

The Chief Justice said upon the first application the Court would make the order as prayed, except as to the destruction of the books, which must not take place within the next three months. In regard to the application by Stephan there would be no order, but the liquidators were directed not to part with the books for a period of three months, applicant to have reasonable access to the books, and to pay the rent for the safe custody of said books.

[Attorney for the Bank, C. C. de Villiers; Attorneys for Stephan, C. & J. Buissinne.]

LINDLEY (THE CLAREMONT MUNICIPALITY INTERVENING) V. CAPE TOWN DISTRICTS WATERWORKS COMPANY. { 1898.
} May 4th.

Waterworks Company—Supply—"Dribble System"—Meter—Interdict.

The Court refused to grant an interdict restraining a Waterworks Company from cutting off the water supply of an applicant who had refused to comply with the company's regulations regarding the method of supplying the water.

This was an application upon notice calling upon the respondents to show cause why they should not be restrained from cutting off the applicant's water supply.

The applicant alleged in his affidavit that he is a resident taxpayer in the Municipality of Claremont.

That between the said Municipality and the Cape Town Districts Waterworks Company a certain agreement exists, whereby the said company undertake to supply the residents with water subject to certain conditions.

That at the beginning of this month petitioner entered into occupation of Barkly House, lately occupied by Mr. T. J. Anderson, and finding certain pipes laid on for the supply of water to the said house, he wrote to the said Waterworks Company requesting them to make some arrangements concerning the supply of water.

That on the 1st April one Arthur Pierce, the managing engineer of the said Waterworks Company, called upon petitioner and informed him that the only terms upon which the water would be supplied to petitioner were that he should take 200 gallons per diem, and that the fact of his not utilising at any time the full amount of 200 gallons daily would not entitle him to any diminution in the charges. Also that the charges would be £5 per annum for such quantity of water, and that payment for any excess as registered by the meter would likewise have to be made, in addition to a charge of 80s. per annum for the use of the same.

That petitioner was also called upon by the said Pierce to sign an agreement embodying these conditions, and containing a further clause by which he was called upon to consent to pay the cost of connecting the premises with the company's mains, although they were already connected therewith by petitioner's predecessor in occupation.

That petitioner was informed that if he refused to sign the proposed agreement the company would so arrange the water supply to the pipes that no more than 200 gallons would flow through them in twenty-four hours, which system of supply was named by the said Pierce "the dribbling system," and which would necessitate the holding of a bucket under the flow of water for a considerable time in order to fill it.

That petitioner was also informed that if he refused to sign either of the contracts submitted to him the supply of water would be cut off.

That the petitioner thereupon made the following offer in writing to the said Waterworks Company: "I am prepared to take water at the rate of over 100 gallons per diem, and to pay according to your registered tariff therefor, and to pay for all water used in excess of the said amount."

He also informed the company that he would not submit to the "dribble system," but that he

was prepared to pay a lump sum for all the water he required, or that he would abide by the offer set forth.

That in response to his proposals he received the following reply from the said Pierce: "I beg to inform you that your supply of water must be taken in accordance with the rules of the company, which have been explained to you. I regret to inform you that as no agreement exists between yourself and the company, the water supply must be withdrawn until an agreement is entered into."

That the water derived from the Waterworks Company's mains is the sole supply from which petitioner can depend, and that his wife, family, household, and horses depend also upon such supply.

That petitioners will suffer considerable hardships if the said supply of water is cut off as is threatened by the said Waterworks Company.

The petitioner prayed for an order restraining the company from cutting off his water supply.

Mr. Pierce, in his answering affidavit to the above, alleged *inter alia* that the company was willing and always had been willing to supply the applicant with any quantity of water per diem, not being less than 100 gallons per diem by the "dribble system," so long as not prevented by the terms of clause 11 of the concession, which supply was in terms of clause 18 of the concession.

That if applicant wished to have all the benefits and facilities of a high pressure meter system the company asked him to sign an agreement to that effect.

That where water has to be supplied by the gallon or 100 gallons, and generally where it has to be supplied in definite quantities from water mains, there are only two systems of supply, the one by meter, the other by the "dribble system."

The "dribble system" is an approved mode of water supply, and is in force in the Claremont, Rondebosch, and Mowbray Municipalities and in the village of Maitland. In Claremont alone, out of 892 houses supplied, forty-four are supplied upon the terms Mr. Lindley is asked to agree to. The remaining 848 houses are supplied by the "dribble system" which applicant refuses to accept.

The City Engineer, in his affidavit, alleged that all private consumers in Cape Town are supplied by the "dribble system," and if anyone required a supply through a meter, and it were granted, he would have to pay the cost of the meter.

Mr. Searle was heard in support of the application.

Mr. Graham, for the respondents, was not called upon.

The Chief Justice said according to the practice of this Court very clear proof of injury was required before the Court would make such an order as was now asked for. It seemed to him there

were only two ways of supplying water in quantities, either on the dribble system or by meter. Respondents were quite prepared to supply water under the dribble system. It was quite clear that they were prepared to give 100 gallons or 200 gallons per day as might be required. No doubt there was no special mention of 100 gallons per day in the interview which took place between Mr. Pierce and the applicant because it was quite clear that 200 gallons would be required. His lordship was quite satisfied from the correspondence that if there had been application for 100 gallons it would have been granted. But that was not the dispute. The two points in dispute were: (1) Whether the dribble system was a reasonable one; (2) whether, failing the dribble system, the applicant was bound to have his water by meter. Now in his lordship's opinion the dribble system was a perfectly reasonable one. It was true that the water must come slowly, but that was in the nature of the case, and if a certain quantity were to be supplied in a few hours. If a tank was erected it would not be necessary to use buckets only. The slight expense of an iron tank would be enough, or if one tank was not sufficient, then a couple of tanks might be used. That was all that was required. The company did not provide the tanks; it provided the water. The dribble system was a perfectly reasonable one, and this application could not be granted. It was said the applicant was prepared to take water by meter, but he objected to pay for the meter. If he wanted the benefit of a meter in opposition to the dribble system, it was only fair that the company should say, "Pay for the meter if you insist upon having it." The application would be refused with costs.

Mr. Justice Buchanan concurred, and said he could not see any grounds why the Municipality should have joined in this application.

Mr. Searle: The Municipality intervened afterwards.

Mr. Justice Upington concurred.

[Applicant's Attorneys, Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

IN THE ESTATE OF ISMAIL SAFODIEN. { 1892.
Ex parte ABRAHAM. { May 4th.

Letters of administration—Executor testamentary—Proof of death—Rule *nisi*.

This matter was last before the Court on the 24th October last (2 C.T.L.B., 822), when an application was made by the present applicant, who is the executor testamentary under Safodien's will, for authority to the Master to accept and file

the death notice and will of the said Safodien, who, it was alleged, was a passenger in the S.S. Deccan; which left Mauritius on the 9th February, 1892, for Bombay, and had not since been heard of, and is alleged to have been lost.

The Court then held that there was not sufficient evidence of Safodien's death and made no order on the application, with leave, however, to apply again if further evidence could be produced.

Mr. Juta now renewed the application, and read notifications from the agent of the Deccan, and from Lloyds' Agents, to the effect that the Deccan sailed from Mauritius for Bombay with a cargo of sugar on the 9th February, 1892, and had not since been heard of.

The Master's report was as follows:

1. The application of the petitioner for the issue to him of letters of administration as executor testamentary of the estate of Ismail Safodien was refused by my predecessor in office on the ground that the proof of the death of the testator was insufficient.

2. With this decision I agree (see *Dormehl v. Morrison's Executors*, 7 Juta, 152).

3. I understand that there were other Malay residents of Cape Town on board the Deccan, and in order to save the expense of further applications to the Court, I shall be glad to know whether I am to be guided in their cases by the decision arrived at in this application.

The Court granted a rule *nisi* calling upon all persons interested to show cause on the 12th July,* why the will and death notice should not be filed, and letters of administration granted to the petitioner as executor testamentary. One publication to be made in the "Gazette." In the meantime the petitioner to be appointed *curator bonis* on his finding security to the satisfaction of the Master.

The cases of the other passengers alleged to be lost in the Deccan would be considered on the return day of the rule *nisi*.

[Applicant's Attorney, P. M. Brink.]

REYNDERS V. REYNDERS.

Mr. Barber moved for a rule *nisi* requiring respondent to show cause why applicant, her husband, should not be admitted to sue *in forma pauperis* in an action for divorce by reason of her alleged adultery.

The Court made the order, the rule to be returnable on last day of term.

* On the 12th July the Court made the rule absolute.

DRAKE V. DRAKE.

Mr. Searle applied for a rule nisi requiring respondent to show cause why she should not be sued by edict for divorce by reason of her alleged adultery. Respondent is resident in Bechuana-land.

The Court made the rule, returnable on last day of term, personal service to be effected.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PEPA V. THE CHIEF MAGISTRATE { 1898.
OF TEMBULAND AND KWAYI. { May 8th.

Review--Proceedings in Chief Magistrate's Court—Irregularity.

On appeal to a Chief Magistrate's Court from the judgment of a Resident Magistrate the Chief Magistrate heard and allowed the appeal in the absence of both parties to the suit.

Held on review, that the proceedings had been grossly irregular and must be set aside.

This was an application upon notice calling upon the respondents to show cause :

1. Why the judgment of the said Chief Magistrate of Tembuland in the case of Kwayi v. Pepa and all the proceedings before him in the said cause should not be reversed, set aside, or corrected upon the grounds following, namely : That the said proceedings were grossly irregular and contrary to law in that (a) the appellant was neither present to prosecute the appeal, nor was he represented by anyone before the Chief Magistrate when the case was called ; nevertheless the said Chief Magistrate in the absence of both parties, both of whom were in default, considered the proceedings and allowed the appeal with costs. (b) The appeal was not noted within the time limited by proclamation No. 140 of 1886.

2. Why the said Chief Magistrate of Tembuland and the said Kwayi should not be ordered to pay the costs of this application.

The facts are as follows : On the 1st December, 1892, the present applicant sued Kwayi, in the Resident Magistrate's Court for Engcobo, for the delivery of a certain white cow and calf, or their value, £8, which cow, the plaintiff alleged, the defendant had paid as a medical fee to plaintiff's

brother, one Ngquleka, about three years ago, it being at that time a small calf, and which was at defendant's request allowed to remain with him, and which calf was subsequently purchased by the plaintiff from his said brother, Ngquleka, and allowed at defendant's request to still remain with him, which calf had now grown up and become a cow, and which cow and its calf the defendant neglects and refuses to deliver to the plaintiff.

The Magistrate granted provisional judgment for the plaintiff for the cow and calf claimed, or £4, with costs of suit.

Thereafter, on the 18th December, Kwayi summoned Pepa to show cause why the provisional judgment granted on the 1st December should not be set aside.

In this case also judgment was given in favour of Pepa.

Thereafter, on the 28th December, or a day after the time within which an appeal can be noted under Proclamation No. 140 of 1886, section 24, Kwayi noted an appeal to the Chief Magistrate. On the 18th January, 1893, the Chief Magistrate, in the absence of both parties, who, although they had received notice, were in default, considered the appeal and allowed it with costs, on the grounds that "Government had ruled that native doctors could not recover fees in a Court of law."

From this judgment the present application for review of the proceedings was made.

The Chief Magistrate filed an affidavit which, after some formal allegations, was to the following effect : "It is true that the appeal had been noted one day after the fourteen days allowed by section 24 of Proclamation 140 of 1886 had elapsed, but I have made it a practice not to bind the natives down to any hard and fast limitation unless a litigant fails to note his appeal through carelessness or indifference, and I am under the impression that the superior Courts are not debarred from exercising the same latitude in that respect. Section 22 also provides for the application of native law under which an appeal for redress of a wrong may be noted at any time. Some notice was given of the day set down for the hearing of the appeal in my Court, and I have not hitherto required the attendance of litigants in my Court personally or by agents provided they are satisfied for the case to be decided upon the record forwarded. To insist upon their appearance would entail expense or inconvenience, which would not be in accordance with the concluding portion of the 24th section of the Proclamation 140 of 1886, which states : "Or such Court may take such other course as may lead to the just, speedy, and as much as may be inexpensive settlement of the case, making such order in regard to costs as justice may require."

Mr. Searle was heard in support of the appli-

ation, and contended that the proceedings in the Chief Magistrate's Court were grossly irregular, and should be set aside. By the appellant's failure to appear, he had abandoned the appeal. Further, he had done nothing to duly prosecute the appeal within the meaning of the 24th section of the Proclamation. The appeal should have been dismissed. He cited "*Rymer v. Solomon*" (2 C.T.L.R., 850).

Mr. Giddy, for the first-named respondent, relied on the Chief Magistrate's affidavit as explanatory of the proceedings.

The Chief Justice said the proceedings in the Court of the Chief Magistrate had been grossly irregular, and must be set aside. He said nothing as to the Chief Magistrate hearing the appeal after fourteen days had elapsed before the appeal was noted, because there might be circumstances in which the Chief Magistrate might allow an appeal to be heard, although the time had elapsed. The irregularity consisted in deciding the case without hearing the parties. It was true he gave notice to both parties that the case would be heard on a certain day, but the appellant did not appear nor did the respondent, and thereupon the Chief Magistrate said, "Certain instructions have been given by the Under Secretary for Native Affairs as to the fees of native docters," and acting upon these instructions, he gave judgment for appellant, appellant himself not appearing, and there being nothing to show that appellant intended to prosecute an appeal. The Chief Magistrate acted *bona fide*. He seemed to have thought that costs would be saved if he did not require the attendance of the parties. His lordship (the Chief Justice) quite understood his feeling. But he ought not to have assumed so much, unless he had some evidence that appellant wished the case to be heard, and as appellant did not appear either personally or by agent, there was nothing to show to the Chief Magistrate that he intended to prosecute his appeal. It was quite consistent with all the circumstances that appellant intended to abandon his appeal. In his lordship's opinion such proceedings could not be allowed, and this Court as a Court of Appeal must set aside the proceedings. As to costs, as he mentioned before, the Magistrate acted *bona fide*, but the second-named respondent, in his lordship's opinion, was very much to blame. He had been served with a summons, and he might have saved further costs by at once giving notice to applicant that he abided by the judgment of the Court, and was satisfied with that judgment. Instead of that, he allowed the case to go on to the Chief Magistrate's Court and allowed further costs to be incurred, and it was only right that he should pay the costs of these proceedings. The proceedings would therefore be set aside, the costs

of this application to be paid by respondent Kwayi.

Their lordships concurred.

Applicants Attorneys, Messrs. Van Zyl & Buissinné.]

LINDANI MGOKO V. THE EAST { 1898.
LONDON TOWN COUNCIL. { May 8th.

Municipality—Regulations—Making Kafir beer—Native Location—*Ultra vires*.

By Act 23 of 1880, section 38, the East London Municipal Council is empowered to frame such bye-laws, rules, and regulations "as may seem meet for the good rule and government of the Municipality."

Municipal Regulation No. 205 framed under the above section reads as follows: "No shop or trading-station shall be allowed within the location except with the approval and during the pleasure of the Council, and no one shall bring into, make, or sell, or barter any Kafir beer or other intoxicating liquor whatsoever in the location."

Held, on appeal from a conviction for "making Kafir beer" in a Native Location within the limits of the Municipality, that so much of the above regulation as prohibited the "making of Kafir beer" was ultra vires the Council.

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate for the district of East London.

The accused was charged with the crime of contravening Municipal Regulation 205, in that upon or about the 26th day of February, 1898, and at or near East London, in the said district, the said Lindani Mgoko did wrongfully and unlawfully bring into, make, or sell a quantity of Kafir beer in the new Native Location, East London, without the approval or permission of the Town Council of East London.

The defendant, before pleading, excepted to the summons on the following ground:

That if the charge is for "selling" Kafir beer she should have been charged under the Liquor Acts. If for "making" Kafir beer, the charge discloses no crime, inasmuch as making Kafir beer is not a crime under the common law, and the regulation is unreasonable and *ultra vires*.

This exception was overruled, and the prisoner pleaded not guilty.

The following evidence was adduced:

Percy Henry Potter, sworn, states: I am Inspector of Municipal Locations at East London,

I know the accused. She is a Kafir woman, and the registered occupier of hut 106 in the East Bank native location. On the 26th February, 1898, from information received I proceeded to the hut of the accused. This was on Sunday about three p.m. I went into the hut. I found behind a screen of boxes one large ten-gallon iron drum containing about seven gallons of Kafir beer. I also found two cans containing about one gallon of Kafir beer. There were six adult Kafir men and two females in this hut. These people were at that time drinking beer. The two women rushed out at once when I got there. I cannot say who the women were, because as soon as I got inside a native named Zwartbooy caught hold of me and tried to force me out of the hut, but he did not succeed. I inquired for the owner of the hut, and was told that she had just gone out. At 7.30 p.m. the accused came to me, accompanied by a native named Gangeliswa Soga. She asked me to forgive her and pass it over this time. She admitted making the beer, and said she knew she had done wrong. I told her I could not do so, and I then warned her to be here on Monday to answer this charge. The accused has not the permission of the Town Council to make Kafir beer. There has been, and is now, a large quantity of Kafir beer made in the town location, and the drinking of Kafir beer goes on to a large extent in the locations in spite of any vigilance on my part. There is more drinking going on in the locations on Fridays, Saturdays, and Sundays. The natives are not at work, the locations are crowded, and as a result of these beer drinks the people become intoxicated, fighting goes on, there are also assaults, and it is dangerous to the peace and good order of the location. For some months I succeeded in stopping the making of beer, and the locations were quiet and orderly. This lasted from May, 1892, to about October, 1892. Since October, 1892, the people have again commenced making beer, and are becoming more riotous and noisy every day. I have been about two and a half years inspector of these locations. In my opinion this Regulation No. 205 is absolutely necessary in the interests of good order and government of the locations in question, which are within the limits of the Municipality.

Cross-examined: The accused has been a registered occupier in this location for about two years and three months, and has always paid her rent. There are three persons domiciled in her hut, who also pay taxes. I have never complained at the Magistrate's office about prisoner before, but I have complained to herself. There was no disturbance inside or outside the hut in question on Sunday, the 26th February, 1898. When I got to the hut I stood in the door and spoke to Zwartbooy, and asked him what was the matter here, I asked this because it had been

reported to me that it was noisy in the hut. He said, "Oh, nothing." Zwartbooy was standing up, not sitting down. I am sure there were six men in the hut. The Kafir beer in question was removed by my orders to my office, where it now is. I produce some of the beer. It is fully-prepared Kafir beer. I have not tasted it. I do not know from my own knowledge whether Kafir beer is intoxicating. The accused has one daughter, as far as I know, twenty-five to thirty years old. I am bringing no charge against Zwartbooy for catching hold of me. I told him he was a fool, and did not know what he was doing. I only produce a small quantity of the beer—about two bottles—now in court. I can produce the remainder if required.

By the Court: I believe brandy is taken into the location also, and a lot of it is mixed with the beer. There is a lot of drunkenness going on in the location, and disturbances are frequent.

Joe, sworn, states: I am a police-constable; I know the accused and her hut in the East Bank location. I was on duty in that location on Sunday the 26th of February, 1898. On instructions from Mr. Potter I was watching the hut of the accused on Sunday, 26th February, 1898, from ten to eleven a.m. I saw numbers of people go in and out of this hut. I went close to the hut. I could see into the hut. There were six men sitting down inside the hut. I then went to call Mr. Potter. The men were not doing anything. I could smell Kafir beer. I tried to go inside the hut but the men would not allow me to do so. The men inside the hut were making a noise. They were speaking very loudly. They appeared to be excited and under the influence of liquor.

Cross-examined: I was watching the hut in question from ten to eleven on the Sunday morning in question. At eleven a.m. I went to call Mr. Potter. He followed me at once. He got to the hut before one p.m. that day. I am certain of it. I was quite sober that day. I have not tasted the Kafir beer in question. I do not drink and cannot say whether it is intoxicating.

The accused in her evidence admitted that she had made the beer, but alleged that she had made it for food. She denied, however, that any drinking had been going on in her hut on the Sunday in question.

Zwartbooy also denied that drinking had taken place in the hut on the Sunday, and alleged that the beer was not ready for use on that day.

Soga corroborated the evidence of Zwartbooy.

The accused was found guilty and sentenced to pay a fine of £1, or undergo seven days' imprisonment with hard labour within the gaol.

The following are the Magistrate's reasons: This is a prosecution under Municipal Regulation No. 205, which reads as follows: "No shop or trading-station shall be allowed within the loca-

tion except with the approval and during the pleasure of the Council, and no one shall bring into, make, or sell, or barter any Kafir beer or other intoxicating liquor whatsoever in the location." On the evidence I convicted the accused of making Kafir beer. It is proved that Kafir beer is made in large quantities in the town locations, and is largely consumed by the inhabitants of such locations, and as a consequence drunkenness prevails to a serious extent, and fights and assaults arising out of this beer-drinking are of frequent occurrence, endangering the peace and good order of the locations. The evidence clearly shows that this beer making, leading as it does to excessive drinking, is a serious public nuisance in the locations, and that being so, I overruled the exceptions and convicted the accused.

The accused now appealed.

Mr. Juta was heard in support of the appeal, and contended that the regulation in question was clearly *ultra vires* of the Municipality, as it was an attempt to interfere with the private rights of a person in his own house.

There was nothing to prevent a person from making wine or beer in his own house, provided no nuisance was caused in consequence. In Stellenbosch and other places wine was made in houses within the Municipality, and a bye-law, prohibiting the making of wine in such places, would be unreasonable and *ultra vires*. The same argument applied in the present case.

Mr. Molteno, for the respondents, submitted that the only question to be determined was whether the bye-law was a reasonable one. He submitted that it was reasonable, and such as might be framed under the Municipal Act 28 of 1880, section 88. He referred to Act 28 of 1888, sections 20, 21, and 22, and cited *The East London Municipality v. Umvalo* (2 C.T.L.R., 845), *Barling v. Town Council of Cape Town* (Buch, 1876, p. 101), *Lawley & Bruce & Co. v. Cape Town Town Council* (9 Juta, 8).

Mr. Juta, in reply: Section 22, Act 28 of 1888, had no application, as it only applied to proclaimed areas.

The Chief Justice said: The only question to be determined in this case is whether the Municipal regulation, in so far as it prohibits the making of Kafir beer in a hut in a location within the Municipality, is within the powers of the Municipality. For myself I am inclined to think that such a regulation may be very beneficial, because if there were no Kafir beer there possibly would be fewer cases of intoxication. It is not, however, every regulation that is within the powers of a Municipality. The powers of a Municipality must be gathered from the statute which created it; and if there is nothing in the statute giving those powers, then the Court

cannot give effect to them, however beneficial they may appear to be. If the power is not given to a Municipality the Legislature should be appealed to, but until the Legislature has conferred upon a Municipality those powers, it cannot administer them. I have carefully looked over the different sections of the Statute incorporating the Municipality of East London, and I can find no one which gives the power which has been exercised in the present case. The Municipality has large powers to frame rules for the order and good government of the town, but all apply to public objects, and I can find nothing which authorises the Municipality to prevent any person within his own house from making liquor of any kind. As has been properly pointed out, in Municipalities like the Paarl and Stellenbosch the great proportion of the inhabitants depend upon wine-making for a livelihood, and it would be wholly beyond the powers of those Municipalities to make a regulation that no wine-farmer was to make wine because brandy leads in a great many cases to drunkenness. Applying the same rule here, this woman made Kafir beer within her own hut. There was no proof of drunkenness. The men were drinking it peacefully in the hut and yet this woman was found guilty of an offence against the Municipal regulation. The Municipality should apply to Parliament to obtain the powers which it seeks to administer, but it cannot enforce this regulation without the sanction of Parliament. For these reasons the Magistrate's judgment will be set aside and the appeal allowed.

Mr. Justice Buchanan (after stating the facts) said: It must be borne in mind that all the Court has decided is that the regulation, in so far as it prohibits the making of Kafir beer in a Kafir hut, is *ultra vires* the powers of the Municipality. The rest of the regulation is not touched.

Anyone having the most casual acquaintance with the natives in Frontier towns knows that a regulation, like the one in question, is most useful and beneficial, and it would be very desirable if authority were given to Municipalities to pass such regulations. The regulation is unreasonable only in this sense, that the Act, constituting the Municipality of East London, does not give the Municipality power to make such a regulation. If I believed that the Municipality had the powers, I would have supported the regulation most cordially. An appeal should either be made to the Legislature for authority, or the Location Act should be applied, in which latter case the Act itself would prohibit the giving of beer—not the making of it—to any native.

Mr. Justice Upington concurred.

Mr. Juta asked for costs against the Municipality, as the prosecution was a private one.

Mr. Molteno opposed on the grounds that the action of the Municipality had not been vexatious.

He cited *Barkly East Municipality v. Jatho and Another* (5 Juta, 57).

The Chief Justice: With regard to the question of costs, the Court is not inclined to give costs against the Municipality. The regulation has been in operation for a long time, sanctioned by the Governor. The Municipality might have believed that it was entirely within their power. There would, therefore, be no order as to costs, although it is quite within the power of the Court to give costs, we do not think this is a case in which the power should be exercised.

[Appellant's Attorneys, Messrs. Fairbridge & Arderne; Respondents' Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN, and
Mr. Justice UPINGTON, K.C.M.G.]

Ex parte FULLER.—In re THE { 1898.
"CHILTONFORD." } May 9th.

Ship—Master—Intemperance—Removal—
17 and 18 Vic., Cap. 104, section 240—Rule
nisi.

Mr. Graham appeared for the applicant, the general manager of the Union Steamship Company, who are agents of the owners of the Chiltonford, and moved for an order under section 240 of the Merchants' Shipping Act of 1854 (17 and 18 Vic., cap. 104) for the removal of Charles Henry, captain of the Chiltonford, on the grounds of his continued intemperance since the arrival of that vessel in this port. The officers and crew of the ship had refused to proceed to sea, on the grounds of the master's intemperance and consequent inability to command the ship and enforce discipline, and they petitioned the agents in Cape Town for his removal.

The Court granted a rule *nisi*, returnable on the 10th instant, calling upon the master of the ship to show cause why he should not be removed, and why the first mate should not be appointed in his place.

On the 10th there was no appearance on behalf of the respondent and the rule was made absolute, and the first mate John Watt appointed acting master.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne,

REGINA V. PETER KIVIET. { 1898.
May 9th.

Theft—Cruelty—Act 18 of 1888, section 2
—Conviction for theft sustained on appeal.

This case came on review from the Resident Magistrate for Knysna. Mr. Justice Upington mentioned the matter yesterday, and suggested that the papers should be laid before the Attorney-General with the object of having the case argued before the full bench.

The prisoner was indicted with the crime of attempted cattle theft, in that upon or about the 15th day of April, 1898, and at or near Newlands, in the district of Knysna, the said Philip Kiviet did wrongfully and unlawfully attempt to steal one sheep, the property or in the lawful possession of Matthys Petrus van Huysteen, a farmer of Newlands aforesaid; or otherwise that the said Philip Kiviet is guilty of the crime of malicious injury to property, in that he did at the time and place aforesaid wrongfully, unlawfully, and maliciously out, stab, and maim a certain sheep, the property or in the lawful possession of Matthys Petrus van Huysteen, of Newlands, aforesaid.

The prisoner was also indicted for the crime of contravening section 2, Act 18 of 1888, in that on the same date and at or near Newlands, in the said district, he did wrongfully and unlawfully, wantonly and cruelly abuse, wound, and torture a certain sheep by cutting or ripping open its abdomen, and by stabbing and piercing its bowels and spine with a knife or other sharp instrument.

The prisoner was found guilty on both counts, and sentenced on the first charge to twelve months' hard labour and on the second to three months' hard labour, to take effect after the expiration of his former sentence.

The evidence of Mr. Van Huysteen, whose herd the prisoner was, went to show that he saw the prisoner walking away slowly from an isolated bush, about thirty yards from where the flock of sheep was grazing, and that within two minutes he observed a sheep walking slowly from the same bush doubled up, as if it was sick or as if there was something wrong with it.

That on getting nearer he observed part of the inside fat and some of the entrails hanging between the hind legs of the sheep, that he called the prisoner and asked him what was the matter with the sheep. He appeared frightened and did not answer at once, at length he said, "I don't know." The entrails were then pointed out to the prisoner, and he was asked what he saw. He said he did not see anything. He was then told to drive the flock home. The wounded sheep was then killed and examined, when it was found that the wound was quite fresh, extended to the

kidneys, and had evidently been inflicted with some sharp instrument such as a knife.

Mr. Giddy was now heard in support of the conviction, and contended that the cruelty was clearly proved. There was also a strong presumption that the prisoner stabbed the sheep with the intention of stealing it when it was dead. The conviction should be sustained.

The Chief Justice said the impression left upon his mind, after looking into the evidence, was that if the accused was guilty of any offence, it was that of attempting to steal the sheep. His intention was there and then to kill the sheep, and he was in the act of doing so when he saw his master coming, when he threw away the knife. He had no object in torturing the sheep, but to kill it in such a way that his master would not notice any traces of its throat being cut. That really accounted for his leaving the poor animal in that condition, so that the second count of the indictment could not be sustained; but inasmuch as his object in stabbing the sheep was to steal it, the first count would be upheld, and the judgment of the Court would be that the first count would be sustained, and the second quashed.

Mr. Justice Buchanan concurred.

Mr. Justice Upington, before whom the case first came, said he wished the case to be argued in Court, because the Resident Magistrate who tried the case was a most experienced magistrate, and he attached great weight to his finding.

REGINA V. SALEWE AND OTHERS. { 1898.
May 9th.

Assault—Defence—Provocation—Conviction sustained on appeal.

This was an appeal from a sentence passed upon the appellants by the Resident Magistrate for the district of St. Marks.

The accused were charged with the crime of contravening section 158, Act 24 of 1886, in that upon or about the 20th day of February, 1898, and at or near the Kei River in the said district, the said Salewe and the others did wrongfully and unlawfully each and all or some or other of them, strike, beat and wound with sticks or other such blunt instruments Mabobole and his son Klaas on their heads and other parts of their bodies, doing unto them then, thus, and thereby actually bodily harm.

The prisoners were found guilty, and sentenced each to pay a fine of £8, in default of payment each to be imprisoned and kept at hard labour for three months.

The evidence showed that an assault had been committed, but the defence was that there was great provocation, and that the assault was occasioned by the attempt of Salewe, who is a headman, to disarm the prosecutor and his son, who, they alleged, were armed with assegais.

Mr. Graham was heard in support of the appeal. He asked the Court to take judicial notice of the fact that Salewe had been a headman for forty years, and that if the conviction were sustained he would probably lose his position.

Mr. Giddy, for the Crown, was not called upon.

The Chief Justice said the question here was, did the accused practically commit an assault upon the prosecutor? Upon that point the Magistrate had clear evidence before him—not only that the others, but Salewe also attacked the prosecutor. It was quite possible prosecutor may also have been guilty of assault, but the accused were by the Magistrate found guilty, and sentenced to pay a fine of £8, or three months' imprisonment with hard labour. The Magistrate took into consideration the provocation which the accused had received from the prosecutor. As far as Salewe was concerned, he had received considerable provocation. If he was to be dismissed from the service because he was found guilty of this charge, it would be a great pity, because an efficient headman might be guilty of an assault without being incompetent. At the same time, he had been found guilty of the assault, and the appeal must be dismissed.

[Appellants' Attorney, C. C. Silberbauer.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.O.M.G.
(Chief Justice), Mr. Justice BUCHANAN
and Mr. Justice UPINGTON, K.O.M.G.]

REHABILITATION.

{ 1898.
May 12th.

On motion by Mr. Watermeyer, the rehabilitation of Emil Johannes Schmidt was granted.

IN THE ESTATE OF THE LATE ROBERT MCKAY.

Mr. Molteno moved for leave to the executor to sell a certain unproductive farm in the district of East London, and to invest the proceeds in the purchase of house property in King William's Town for the benefit of the estate.

The Court made the order, the re-investment to be made subject to the approval of the Master.

WILLIAMS V. WILLIAMS.

Mr. Tredgold moved for leave to sue by edictal citation in an action against the petitioner's wife, said to be at Pitsani, British Bechuanaland, for restitution of conjugal rights, failing which for divorce.

The Court granted leave, personal service to be effected, citation returnable on June 12.

IN THE INSOLVENT ESTATE OF JAMES S.
REED.

Mr. Graham moved for authority to a single trustee to pass transfer of a piece of land marked No. 8, without the limits of the Garrison Ground, Port Elizabeth, sold in the said estate, the co-trustee being insane and incapable of transacting business.

Granted.

TORBET V. TORBET.

Mr. Watermeyer moved to make absolute a rule nisi giving authority to the applicant to transfer to Atwell & Co. certain interests in landed property in Cape Town, for which full consideration has been received, without the assistance of her (applicant's) husband, who is absent from the Colony and has refused to aid in the matter.

The Court made the rule absolute, with costs of opposition.

LOGAN V. COLONIAL GOVERNMENT. { 1898.
May 12th.

Pleadings—Amendment—Costs.

This was an application on notice for leave to plaintiff to amend his declaration of claim by inserting therein a schedule of loss of profits in respect of the contract referred to in the fourth paragraph.

Mr. Searle appeared for applicant; Mr. Giddy, with him Mr. Webber, for the Colonial Government.

Mr. Searle said this application was the result of certain correspondence which had passed between the parties. About two months ago a letter was written by plaintiff's attorneys, stating that they were about to make an investigation of Mr. Logan's books at his various bars and refreshment-rooms on the railway system. The Government were asked if they would appoint an accountant to be present on their account, and they replied that they would prefer not to appoint an accountant. Mr. Logan then took his own course, and now a schedule had been prepared showing loss of profits, a copy of the same having been served upon the Government.

Mr. Justice Upington: Is that not something like pleading evidence?

Mr. Searle referred to the case of "Philip v. Metropolitan Railway Company." (8 Sheil, 55.)

Mr. Justice Buchanan: That was quite a different case. There a contract was carried out.

The Chief Justice: There is no special damage pleaded in this case—it is general damage.

Mr. Giddy said he was not there to object to the application for an amendment. He did not, however, see the use of having the schedule annexed to the declaration.

Mr. Searle: We want the words "and loss of profit" to follow "damages" in the fourth paragraph. In the letter written to defendants on the 14th March it was stated that the schedule showing this loss of profits would be served upon them within a reasonable time before the trial. It was proposed that the case should come on for hearing on the 30th May.

The Chief Justice asked why it was proposed to delay until the last day of term. Why could it not come on sooner?

Mr. Searle said this schedule had only been served on the Government a few days ago.

Mr. Giddy said the schedule represented a loss of profits amounting to £106,574 18s. 4d., and it would require some time to go through it.

The Chief Justice: At all events, by the 30th May you will be ready?

Mr. Giddy: Yes, my lord.

The Chief Justice: Very well, we shall take it on the day set down.

Mr. Giddy said applicant claimed that the costs of this application should be costs in the cause. He decidedly objected to that.

Mr. Searle, on the matter of costs, contended that they ought to abide the result of the trial, because the tone of defendants' reply indicated that they were opposed to this application.

The Chief Justice: On the part of the Government there has been no opposition, so that the Government might have remained out of Court, excepting on the question of costs. On that point the Government was entitled to come into Court. The amendment as to "loss of profits" would be allowed, applicant to pay costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissonné; Defendants' Attorneys, J. & H. Reid & Nephew.]

NAUDE V. NAUDE'S EXECUTORS. { 1898.
May 12th
& 16th.

Mutual will—Massing of joint estate—Survivor—Usufruct—Renunciation—Prohibition against alienation.

Husband and wife, married in community of property, made a mutual will by which they appointed the survivor as heir with their children of the first dying, directed a valuation of the joint property in order to ascertain the shares of the children, the immovable property being valued at ten shillings a morgen, and provided that the survivor should remain during his or her lifetime in possession of the joint estate, "but so that the said survivor shall have no right to sell. . . . that property, in

such manner that such survivor shall not be bound to pay out during his or her natural lifetime to the majors or married heirs their portions."

Held, that upon the death of the husband the wife was entitled to her half-share and a child's portion and to a usufruct in respect of the rest of the joint estate, that the shares of the children were fixed by the valuation, that the prohibition against alienation applied only to the children's shares, and that the surviving wife was at liberty to renounce her life interest and pay out or secure the children's shares upon the basis of the valuation and for that purpose sell such portion of the immovable property as might be found necessary.

The cases of Lucas vs. Hoole (Buch. 1879 p. 132), and Smith vs. Executors of Sayers (Foord 66) distinguished.

This was a special case stated for the determination of the Court in the following terms:

The plaintiff is the surviving spouse of the late David Roelof Naudé, to whom she was married in community of property; the defendants are executors testamentary duly appointed to the estate of the said Naudé.

The plaintiff and the said Naudé executed a mutual will on the 18th June, 1892.

The testator Naudé subsequently died without having in any way revoked the said will. The plaintiff has adiated and accepted benefits under the said will.

The said will appoints and nominates as heirs of the first dying the survivor and the children of the testators born in their lawful wedlock; two children of the testator born of his former marriage and now surviving were also nominated as heirs of his estate, on certain conditions as to collation (unnecessary to specify for decision in the present case).

The said will further provides that within one year after the death of the first dying the survivor shall cause the whole of the joint estate to be valued, "and that in any case the immovable portion of our joint estate shall be valued at 10s. per morgen, and thereafter a liquidation and distribution account shall be framed, in order clearly to find the half to which the survivor is entitled, and the half which the children shall inherit."

The will further provides that the survivor shall during life remain in the full and undisturbed possession of all the joint property, but without right to mortgage or sell it; that the

survivor shall not be bound to pay out their portions to the major or married heirs during lifetime, but that if the testatrix be the survivor she shall be bound to pay out in full their portions to the children of the testator by his former marriage, and may sell such movable property of the joint estate as may be necessary should she desire it.

The will further provides that notwithstanding the foregoing provisions in case the survivor shall desire to marry again she shall be obliged to pay out in full their respective legacies to all the major or married children, and to deposit the legacies of the minors in the Colonial Orphan Chamber or pass a bond securing these portions, and for this purpose the immovable property left by the testator shall, if necessary, be sold by public auction, but not out of hand.

There is immovable property in the estate of the present value of considerably more than 10s. per morgen.

The plaintiff contends that:

1. The legacies of the children of the said Naudé by his former marriage are finally fixed and determined by the said liquidation and distribution account, and must at once be paid out by the plaintiff.

2. The legacies of the children of the plaintiff and the said Naudé are also finally fixed and determined by the said liquidation and distribution account.

3. For the purposes of this liquidation account the immovable property in the estate must be valued at 10s. per morgen.

4. The plaintiff is entitled to a life usufruct over that portion of her deceased husband's estate which remains after deducting the legacies of his children by his former marriage, and the child's portion due to the plaintiff as survivor.

5. The plaintiff may at any time, whether she wishes to remarry or not, waive her life usufruct over the said portion of her husband's estate, and proceed to pay to the major and the married children, and to secure to the minor and unmarried children of herself and her deceased husband, their respective legacies in paragraph 2 of this contention mentioned.

6. For this purpose the plaintiff may, notwithstanding the prohibition in paragraph 3 of the said will, sell such portion of the immovable property in her husband's estate as may be found necessary.

7. Thereafter the plaintiff will become the sole and unrestricted owner of the joint estate of herself and the said David Roelof Naudé.

The defendants contend:

That the plaintiff is only a usufructuary as to half the estate and is not entitled to sell any of the immovable property (save such as may be necessary to pay out the portions of the children

by testator's former marriage, and then only in case the movables are insufficient for that purpose) unless or until she remarries, in which case the said property may be sold; and if sold, must be sold by public auction, and half the proceeds (less a child's portion due to the survivor) paid over to the children of the testator and testatrix, and dealt with as in section 4 of the will, that in case she does not remarry half of the immovable property less a child's portion, and such as may have been necessary to be sold for the purpose of paying out the children by testator's former marriage, becomes the property of the children of the testator and testatrix.

Wherefore the parties prayed for the judgment of the Court upon their several contentions, and that the costs of this action might be ordered to be paid out of the said estate.

Mr. Webber, for the plaintiff, contended that her life interest was a purely personal benefit, which she could waive. The only object of the prohibition against alienation was to protect the heirs' portions. The heirs could not go behind the valuation account.

Mr. Searle, for the defendants: The position is the same as in "*Lucas v. Hoole*" (Buch. 1879, p. 182), and "*Upton v. Upton*" (Buch. 1879, p. 289). The plaintiff cannot sell, as the *dominium* is not in her.

Mr. Webber, in reply, cited "*Barry, v. Executors of Kunhardt*" (2 Juta, 89; "*Oosthuysen's Tutrix v. Moffat and Another*" (5 Juta, 819), and Sande (*De prob rerum alien*, 2, 8, 1, 7).

Cur ad vult.

Postea (May 16th).

The Chief Justice said: If the will, which the Court now has to construe, had contained a clear provision that the whole of the joint estate of the testators should, on the death of the survivor, devolve on others, then the case of *Lucas v. Hoole* (Buch. Rep., 1879, p. 182) would have been applicable. There would have been a concurrence of the two requisite conditions for depriving the survivor of two spouses married in community of property of the power to dispose of his or her half of the joint estate, viz., a consolidation of the joint estate into one mass, for the purpose of a joint disposition of it after the death of the survivor, and an acceptance of benefits by the survivor. The first clause of the will appoints the survivor, together with the testators' children, as heirs of the first dying. The second clause directs that a valuation of the joint estate shall be made within one year after the death of the first dying, the landed property being appraised at the rate of ten shillings per morgen, and that thereafter a liquidation and distribution account shall be framed in order to ascertain the shares

of the survivor and children respectively. The third clause authorizes the survivor to remain in possession of the joint property during his or her lifetime "with the full right to the usufruct of the same, but so that the survivor shall have no right to sell . . . that property, in such a manner that the survivor shall not be bound during his or her lifetime to pay out their portion to the majors or married heirs." Nowhere in the will is the survivor deprived of the child's portion given by the will in addition to his or her half-share of the joint estate, and nowhere is the privilege of paying out the shares of the children upon the basis of a 10s. valuation per morgen of landed property taken away. The shares of the children are not to be taken out of the survivor's half-share, but out of that of the first dying. The whole will has a consistent meaning if the prohibition against alienation is read as applying to the shares of the children, of which the survivor was to have the usufruct. In the case of "*Smith v. Executors of Sayers*" (Ford's Report, 66), the surviving testator had also been appointed as heir of the first dying together with the children of the testators, and as usufructuary of the whole of the joint estate, but in the absence of any direction that such joint estate should, after the death of the survivor, devolve on the children, the Court held that the survivor could dispose of his half-share and child's portion. The present case therefore stands thus: The wife is the survivor, and there are two children of the testator by his first wife, and five by the testatrix. She is entitled to one half of the joint estate, and a child's portion, making nine-sixteenths of the whole. The two first-named children are entitled to immediate payment of their two-sixteenths. The five other children are entitled to five sixteenths, but subject to their mother's usufruct. How, then, are the respective portions of all the children to be ascertained? The defendants' answer is by selling the property by public auction, and only in the case of the survivor's remarrying. The plaintiff's contention, on the other hand, is that the testators have themselves fixed the valuation of the land, and that if the land is worth more than ten shillings a morgen, the survivor was intended by the will to have the benefit of the excess. In my opinion, the plaintiff's contention is the correct one. The will expressly directs that the valuation at the rate of ten shillings per morgen shall be made for the purpose of ascertaining the children's portions. When those portions have been ascertained, the surviving widow is clearly entitled to renounce her usufruct in respect of her children's shares and pay out or secure those shares. For that purpose she may sell immovable property, because, the sole object of prohibition against alienation being to secure

the children's shares during the continuance of her life interest, that object falls to the ground upon her renouncing her usufruct and paying the children's shares. Upon every point, therefore, the judgment of the Court must be in favour of the plaintiff's contention.

Mr. Justice Buchanan said: In construing this will it must be borne in mind that it purports to dispose only of one half of the joint estate. The first clause, which institutes the heirs, refers specifically to the estate and effects of the first dying. There is no attempt made to dispose of the joint property on the death of the survivor, nor does any clause consolidate or mass the whole property, unless, as is contended by the defendants, the third paragraph of the will does so. The first clause institutes the survivor in a child's portion, and the children of the marriage and the children of the husband by the former marriage as heirs of the husband's estate, the wife being the survivor. It is admitted that the plaintiff (the widow) takes one half of the estate by virtue of the community, and a child's portion under the will. The second clause provides that "in order clearly to find the half to which the survivor is entitled, and the half which our children shall inherit, the whole joint estate is to be valued, and that 'in any case' the immovable property shall be valued at 10s. per morgue." It is now said that the immovable property considerably exceeds this value. If it did so at the time the mutual will was made, this clause is practically a further bequest made in favour of the survivor. So far there is no difficulty in discovering the intention of the parties. But it is contended that the third clause imposes a restriction on the survivor, and derogates from the bequests previously given. Here the testators declare their will to be that the survivor shall remain for life "in the full and undisturbed possession and enjoyment of all our property, with the full right to the usufruct of the same, but so that the said survivor shall have no right to sell or in any other way to pledge or mortgage that property, in such manner that the survivor shall not be bound to pay out during his or her lifetime to the majors or married heirs their portions." What is the property of which the survivor thus becomes the usufructuary? She is the absolute owner of one half the estate by virtue of the community, and as this half is not affected by the will, the usufruct can apply only to the half estate disposed of. This reading enables us to give a consistent interpretation to the whole will. The prohibition of alienation in the third clause may have been inserted for the purpose of securing the children's portions. As long as the survivor remained unmarried she could enjoy the usufruct of the estate but could not alienate it. But if she remarried she was required by the fourth clause to pay out the

children's portions, and, if necessary for this purpose she required to sell any of the immovable property, then such sale was required to be by public auction. The usufruct given by the 8rd section, it appears to me, was a further benefit conferred on the survivor, not a reduction of previously given rights. The will does not definitely postpone the payment of the heirs until after the death of the survivor, but only provides that the survivor shall not be bound to make the payment during her lifetime. If, however, she chooses to make the payment at once there is nothing to prevent her, and how the portions are to be ascertained is determined in the second clause. In my opinion, therefore, we shall be giving effect to the intention of the testators, as expressed in their will, by giving judgment in favour of the plaintiff's contention.

Mr. Justice Upington also concurred.

Judgment accordingly, costs to be paid out of the estate.

[Plaintiff's Attorney, J. W. Sauer; Defendants' Attorney, W. V. Stokes.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.O.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.O.M.G.]

REGINA V. MEITJEN RAS. { 1898.
May 16th.

Police Offences Act, 1882, section 10—Abusive language — Public place — Conviction quashed on review.

The Chief Justice said this case had come before him as Judge of the week. The accused was charged before the Special Justice of the Peace at Heidelberg on 24th April with contravening section 10, Act 27 of 1882, by using abusive language to a lady in her own house. His lordship said that no offence had been committed under the Act. The language must be used in a public place—in the hearing of some one—and here there was no evidence that the abusive language was heard by anyone. Under these circumstances the sentence—a fine of 10s. or one month's imprisonment with hard labour—must be set aside.

KERNAN V. KERNAN. { 1898.
May 16th.

Mr. Sheil moved that the rule nisi be made absolute in this case and that the marriage be dissolved. Personal service had been effected. This

was the return day of the rule, and defendant had not returned to his wife. Counsel read an affidavit by plaintiff, in which she alleged that her husband had not returned to her in obedience to the order of Court.

The Court made the rule absolute, and gave judgment as prayed, dissolving the marriage, with costs.

WOLF V. WOLF.

On the motion of Mr. Shell, the Court made absolute the rule nisi allowing plaintiff to sue *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce.

ABRAMS V. ABRAMS.

On the motion of Mr. Shell, the return day in this matter was extended to the 30th instant.

HALL AND CO. V. KEARNS. { 1893.
May 16th.

Warranty—Manufacturer—Sale—Presumption.

If goods are ordered of a manufacturer for a particular purpose known to the vendor there is an implied warranty that they shall be fit for such a purpose, but if an article of a definite nature is ordered the manufacturer warrants no more than that the article supplied is as fit as any answering the description in the order.

If the vendor is not the manufacturer and the goods are not sold with all faults the legal presumption is that the vendor warranted them against such latent defects as would render them unfit for their ordinary use, but this presumption may be rebutted by the special terms of the sale or by other circumstances showing that a warranty was not given or understood to be given.

The plaintiffs ordered from the defendant, who was not a manufacturer, a "One-horse Purnell Gas-engine" which was required to supply the motive power for grinding coffee.

The defendant supplied such an engine, which answered in every respect to the description of the one ordered, and the plaintiffs paid for it.

After being used for a short time it was found that, owing to the insufficiency of the gas pressure in Cape Town, it did not work satisfactorily, but there was no evidence that

any other engine of that description would have worked better with that pressure.

Held, that any presumption of warranty that the engine would be fit for the plaintiffs' purposes was rebutted by the circumstance that the defendant only undertook to supply, as in fact he did supply, a particular article of a particular manufacture.

This was an action instituted by Hall & Co., coffee merchants, of Cape Town, against the defendant for £100; £70 being the price of a certain Purnell patent gas engine supplied by the defendant to the plaintiffs, and which the latter alleged had proved unsuitable for their business, and £30 damages alleged to have been sustained by breach of contract.

The declaration alleged that on or about 9th August, 1893, the plaintiffs entered into an agreement with the defendant whereby he agreed to supply to them a gas engine, with fittings appurtenant thereto, suitable for the purposes of their business, to erect same on plaintiffs' premises in a proper and workmanlike manner, and to connect it with a coffee mill and roasters belonging to the plaintiffs; the defendant further guaranteed to keep the said engine in proper repair for a period of six months, reckoned from the date when the said engine was erected and ready for use.

That the plaintiffs agreed to pay the sum of £70 for the said engine and work in the following manner, viz., £20 in cash at the date of the erection of the engine and the balance in five monthly instalments of £10 each.

That thereafter the defendant delivered the engine at the plaintiffs' place of business, and in or about the month of October completed the erection of the same, whereupon the plaintiffs paid the purchase price.

That thereafter the engine, either by reason of some latent defect of which the plaintiffs were at the time of the said agreement ignorant, or by reason of the unskilful and improper manner in which it was erected, proved to be unsuitable for the purposes of the plaintiffs' business, and of very little use to them. If the plaintiffs had known the above facts at the date of the said agreement they would not have entered upon the same; wherefore they, as they were entitled to do, tendered to the defendant to return the said engine, and claimed from the defendant a return of the purchase price, but the defendant refused to take back the engine and to repay the price.

That the plaintiffs have sustained damage in their business by reason of the failure of the defendant to perform his contract as above set forth in the sum of £30.

The plaintiffs claimed that:

(a) The defendant pay them the sum of £70, with interest from 9th August, 1892, they tendering back the said engine.

(b) The sum of £30 damages.

(c) Further relief with costs of suit.

The defendant admitted the contract and the formal allegations in the declaration, he denied that he gave any such guarantee as that alleged, and said that the only guarantee which he gave was that contained in the prospectus of the "Purnell Patent High Speed Otto Cycle Gas Engines," of which a copy was supplied to the plaintiffs, and which was in the following terms:

"Guarantee of maintenance given for six months to replace any parts of engine which may break, provided such breakage is not caused by any unfair treatment or carelessness." The defendant alleged that in terms of his agreement he duly supplied the plaintiffs with the engine, and completed the erection of the same on the 15th August, 1892, on which date the plaintiffs accepted delivery. The defendant denied that the engine supplied by him to the plaintiffs, in terms of his contract contained any latent defect, or that it was unskilfully erected, or that it was unsuitable for the purposes of the plaintiffs' business, but he said that if the engine has failed to work such failure has been due to the negligence of the plaintiffs in not working the engine with proper care and skill, and owing to their neglect in failing to directly connect the engine with the Gas Company's main in order to supply it with gas of sufficient pressure and purity. He admitted that the plaintiffs had offered to return the engine to him, and that he had refused to take it back on the terms offered by them. He denied that the plaintiffs had sustained damages in the sum of £30, as alleged, or in any sum, or that he had failed to perform his contract with them.

Wherefore he prayed that the plaintiffs' claim might be dismissed with costs.

The replication was general, and upon these pleadings issue was joined.

Mr. Searle and Mr. Graham appeared for the plaintiffs, and Mr. Sheil for the defendant.

In answer to Mr. Searle,

William Hall, one of the plaintiffs and partner in the firm of Hall & Co., coffee merchants, Fleet-street, deposed: I had some dealings with defendant last year before the one-horse Purnell gas-engine was supplied to me. On 9th August he wrote me a letter, but before that I had visited Butter's store with Mr. Kearns, jun., and seen a smaller engine working. Mr. Kearns, jun., transacted the business. I saw an engine, $\frac{1}{2}$ -horse-power, at Butter's; it was in motion, but not working any machinery. Mr. Kearns, while walking up the street, guaranteed to keep the engine which I would purchase in order for six months. We

purchased a similar engine, $\frac{1}{2}$ -horse-power, which they brought over and erected, but it would not work. Then Mr. Kearns suggested that I should take the one-horse-power engine, which would do all my work and which I did buy for £70. After that I received the letter referred to (handed in). The engine was brought over two days afterwards, and they put it together and tried to get it to go; indeed they were at work in this way on the engine from 15th August to 16th October trying to get it into order. They put it on no foundation. It is a patent gas-engine of Purnell's. The gas meter is close to the frontage of the store. I put in a new service pipe ($1\frac{1}{4}$ inch) from the meter to the engine. That pipe went to the roaster, and there was a branch to the engine. The engine had to work a coffee mill and the roasters. It was attached to the mill in August and to the roasters in October. Sometimes it would go for an hour or so and stop. Whenever there was any pressure it would stop. When it was connected with the roasters it went fairly well for a week, and I paid £20 on account and gave defendant three promissory notes, all of which have now been paid, the last in February.

By the Court: Was the engine going all that time?—A. Oh no! my lord.—Then why did you pay the last instalment?—We were under obligations to the Imperial Government and needed a machine very badly. Mr. Kearns and his man used to come almost daily, up to the end of January, to repair the engine. In fact, they were constantly there. I could get very little work out of the machine. During the latter part of the year we had to employ coolie labour to grind the coffee. Towards the end of January I called in Mr. Harcombe, engineer, who remained for about a day, and pointed out a flaw in its construction. I called in Mr. Gearing towards the end of February, and he took the machine away. The man who attended the engine was Isaac de Beer. He was careful as to its management. For hours I have stood over the engine trying to get it to go. There was no carelessness in attending to it. In December or January I altered the pipe from the meter to the main. Mr. Kearns had suggested that there should be this connection. I had a good supply of gas, paying about £10 a month for it. Subsequently I cabled to England for another engine, 1-horse-power. That engine I got erected in two days, and it has never stopped since. It has the same gas supply, and cost about £10 more. I have been put to a lot of inconvenience through Kearns's engine. I have lost orders in town, and the military authorities, for whom we had the contract, were complaining, while for coolie labour we were out £15 for grinding. £30 does not represent a quarter of the loss that we have sus-

tained through the non-working of the engine. On February 14 we made an offer to Kearns—that they should refund us £80 and take back the engine. This was refused. They also denied the guarantee.

Cross-examined by Mr. Sheil: The engine was sent over about 7th August. I deny that the engine was tested before 9th August. I admit it was put down temporarily to try it. It was I who selected the stand for the engine. The engine did not work, as the foundation was weak. The engine was completed on the 14th. It is not a fact that the engine continued to work from that day till now. I know nothing about gas-engines. I don't remember Mr. Kearns telling me that the engine must be kept very clean. I had about twenty-four burners on the coffee-roasters, and a supply of gas was also needed for the shop. Defendant did tell me towards the end that there was too great a drain upon the gas supply to give the engine a proper chance. I first complained about a week after I made the first payment. I kept the engine hoping it would improve. I got some work out of the engine, but not so much in ten minutes as I got out of manual labour in an hour. I am not aware that the engine is broken. There was a plate put on by Mr. Cunningham. I never gave any instructions to have the engine repaired. My business has increased within the last few months. I rejected the proposal made to me by defendant in his letter—that if I laid down a new gas connection and the engine were still found not to work satisfactorily, he would refund the £70—because I did not want workmen about my premises, and because Mr. Harcombe told me the engine was defective.

William Arnott, manager of the Gas Company in Cape Town, deposed that Hall & Co. had a new service-pipe laid on from the main to the meter on 15th October. There was a three-quarter inch pipe, and they put in one-and-a-half inch. That was sufficient to drive an engine four or five times the power of this one. The gas supply in Cape Town was constant during the day. There were no complaints.

Cross-examined: Witness knew nothing about this gas-engine. There had been complaints about gas-engines, but the Gas Company usually found that the fault in the engine was due to the want of cleanliness. New mains were laid in Plein-street about six weeks ago.

Sydney Hall, one of the plaintiffs, deposed that young Mr. Kearns guaranteed the engine for six months. He stated that about the 9th August going up the street. They took over the engine about 9th October. It never went well. It was always stopping, and the defendants were always taking pieces away.

Cross-examined: The guarantee was given some time in August. The engine did not grind coffee

for two months. They could not get a revolution out of it for two months. Witness did not remember defendant telling him to keep the engine clean.

By the Court: Witness had no experience of gas-engines, but according to the prospectus "a child could work them." The engine was defective in this instance.

Joseph Harcombe deposed that he had been called in by plaintiffs to inspect the engine. He got it to go round once or twice, but it would not drive the mill. He examined the valves and inspected the air-holes. They were clean. Witness thought it might be made serviceable to grind coffee, but not as he saw it. There was a sufficient service of gas. He disconnected it with the roasters, and it went a little better with the full pressure, but would not grind. The fault of the engine was that the gas-hole was too small and the air-hole too large.

Cross-examined: When witness examined the engine he cleaned the valves. Had never seen a Purnell engine before. Mackinnon, the maker of this engine, had some reputation in the market.

Isaac de Beer, engine-driver, deposed that he attended to this engine. It worked sometimes for half a day, then perhaps for a couple of hours, and stopped. Witness always cleaned it and kept it oiled. Mr. Kearns got the engine to work, but as soon as he had gone it stopped. The engine they had now worked well. Didn't see the engine broken.

Cross-examined: Before he went to Mr. Hall's he was at Cunningham & Gearing's as a stoker. His duty was to shovel in coals. He knew nothing about a gas-engine. He cleaned this one repeatedly. With the new engine they were only working one roaster; with the old engine they worked two roasters. Though he had cleaned the engine, he failed to notice that it had been broken.

Sydney Gearing, of Cunningham & Gearing, deposed that he had this engine at his place some time in February. It was for repair. They fitted up the engine in the shop, found the mixture of gas and air was not regular, but finally got it to go. A gas-engine was a tricky thing—sometimes it would go and sometimes it would not, and it carried on just as it liked. The fault here was too much gas. In the shop witness had it put up, and it went all right. It was taken to Mr. Hall's place and put up again, and left going all right. After it stopped Mr. Hall had some difficulty in setting it going again. The fault of the engine was too fine adjustment. He thought there were other engines better adapted to the gas pressure here. A plate had been put on to cover a fractured bracket.

Cross-examined: In his opinion, if there had been an even pressure of gas, the valves would have worked all right.

For the defence,

Herbert William Edlin, member of the Institute of Mechanical and Electrical Engineers, deposed that he was familiar with the construction of gas-engines. He had seen the engine in dispute for the first time on Friday. It was on the Otto type. He gave a minute explanation of the working of gas-engines. If there was too little pressure, it was impossible to work the engines. He had seen two other engines of the same type in Cape Town. They were working perfectly, but they had both direct connection with the main. A surplus pressure of gas could be regulated, but a deficient pressure could not be regulated. Witness had examined the engine, and the only defect he found was the fracture. Witness knew that there was deficient pressure of gas in Cape Town on occasions, and had experienced it with a Crossley gas-engine. He did not see any reason why this engine in question could not be made to work. If there were a direct connection with the Gas Company's main, he thought this engine could be made to work. There should be a pipe brought from the main direct to the engine, and not led off to the roasters. The engine he found was not at all clear.

Cross-examined: Had never tried to work this engine. If the pipe was disconnected with the roasters and if the gas was not lighted in the shop, the engine would be receiving a full supply from the main. There was nothing in the construction of the engine to prevent it working properly. Had known engines break in the way this one had done by sheer dirt.

By the Court: Witness attributed the incapacity of the machine to a want of sufficient pressure from the main.

Robert Kearns, machinery agent and importer and agent for the Purnell Gas-engine, deposed: I entered into an agreement on 9th August with plaintiffs to supply them with a 1-horse-power Purnell gas-engine. Before I entered into the agreement we had already supplied them with a 1-horse-power engine, which, however, was not strong enough for the work that had to be done. Then they took the 1-horse-power engine, which was on trial from 5th to 9th August. The trial was satisfactory, and the machine was permanently bolted down to the floor. We gave no guarantee beyond the guarantee which the makers give in their prospectus.

By the Court: I am really the purchaser of the engines, having the sole right of selling here.

By Mr. Sheil: I distinctly told Mr. Hall at the outset that he must have a direct connection with the main. Their large service pipe fed the roasters, and I connected the engine with this pipe by a tributary pipe. At the same time I was careful to point out to Mr. Hall that the drain

upon the pipe for the roasters materially affected the engine. The engine was not connected with the roasters till October. It does not require much power to work the roasters. It can be done by hand. At times the engine went very well; at times it fell off; and at times it was difficult to start. Plaintiffs never raised any serious objection to the engine until 8th February, though Mr. Hall very frequently found fault when he (witness) took it to pieces and satisfied him that the engine mechanically was all right. We found latterly that the engine was very dirty. I have supplied other engines of this make to other people in Cape Town, and always recommended that there should be direct connection with the main.

Cross-examined: We were engaged about twenty-three or twenty-five days on the engine in Halls' premises manufacturing shafting and pulleys, &c. The engine did its work well so long as the roasters did not lead off all the gas.

By the Court: Q. Your evidence is that the one thing needful was a connection with the main. Why did you not carry out the one thing needful instead of delaying for two months?—A. That was for Mr. Hall to do.

The Chief Justice said it would not be necessary to hear any further evidence.

Mr. Searle then addressed the Court, and contended that by the *actio redhibitoria* the plaintiffs were entitled to repudiate the contract as the engine contained latent defects rendering it useless. They were also entitled to the damages which they had claimed.

Mr. Sheil was not called upon.

The Chief Justice (after stating the facts) said: By our law, as by the law of England, if goods are ordered of a manufacturer for a particular purpose known to the vendor there is an implied warranty that they shall be fit for such a purpose. If, however, an article for a definite nature is ordered, the manufacturer warrants no more than that the article supplied is as fit as any answering the description in the order.

Even if the vendor is not the manufacturer, and the goods are not sold with all faults, or "voet-stoots," there is a legal presumption in our law, differing in this respect from that of England, that the vendor warranted them to be free from such latent defects as would render them unfit for their ordinary use. This presumption, however, may be rebutted by circumstances showing that a warranty was not given or intended to be given or by the special terms of the contract of sale.

The defendant, by his contract, undertook (1) to supply the plaintiffs with a "one-horse power Purnell gas-engine," and (2) to connect the same with the coffee mill and roasters.

The contract was partly of sale and partly of

letting of services. So far as the defendant undertook to perform certain services it is admitted that they were properly performed.

It is contended, however, that the engine, after having been used for some time, was found to be unfit for its intended purpose of supplying regular motive power for grinding coffee, and that the plaintiffs are entitled to recover the price they have paid and damages for breach of contract.

I quite agree that the defendant was bound to supply a sound engine corresponding exactly to the description of the one ordered. If the plaintiffs had proved that the engine actually supplied had inherent defects which are not common to the class of engines ordered and that it was in consequence unfit for its intended uses, they would have had a firm foundation on which to rest their case. But the evidence satisfies me that the engine supplied was a sound "one-horse Purnell gas-engine," neither better nor worse than the ordinary engines supplied by the manufacturers under that name. It had this defect, that it did not work with sufficient regularity in Cape Town owing to the insufficiency of the gas pressure, but there is no evidence that any other engine of that type would have worked any better with such insufficient pressure.

The defendant was not the manufacturer of the engine, but this circumstance does not materially affect the present case. He supplied to the plaintiffs the very article which they had ordered and cannot be made responsible for alleged defects which are common to all articles of that class. At all events the presumption of warranty that the engine would be fit for the plaintiffs' purposes is rebutted by the fact that the defendant only undertook to supply a particular article of a particular manufacture. Having supplied that article he was entitled to be paid for it and cannot be ordered to repay the price or to pay damages on its being afterwards found to be, in some respects, unfit for the purposes for which it was required. The judgment must therefore be for the defendant with costs.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

DRAKE V. DRAKE.

{ 1898.
May 17th.

Mr. Searle, on behalf of plaintiff, moved for the appointment of a commission *de bene esse* to take the evidence of a witness at Ramoutsa, in British Bechuanaland.

The Court granted the order, and appointed Mr. Advocate Vincent commissioner.

HUMAN V. HUMAN'S EXECUTORS. { 1898.
May 17th,
June 6th.

Will—Construction—Heirs—"Children and grandchildren"—Succession *per stirpes*—Legitimate portion.

A testator by his will appointed his children and grandchildren as his heirs.

Held that, in the absence of any other indication to the contrary in the will, the children of those of the testator's children only who predeceased him must be deemed to have been included in the term "grandchildren."

By a codicil the testator instituted the children of his son J. as heirs in his stead and directed that J. should draw only the interest on the amount which would have devolved on him as heir.

After the testator's death in 1872 J. claimed his legitimate portion, which was paid to him by the executors.

Held that upon J.'s death his children were entitled only to the balance of his inheritance, after deduction of his legitimate portion.

This was an action instituted by Dirk Cornelis Christian Human against Frederik Ryk Neethling and Hans Jurie Human, under the following circumstances as disclosed in the declaration, which was in these terms:

1. The plaintiff is the son of Johannes Petrus Human, and the grandson of the late Dirk Cornelis Human, and resides in the division of Robertson. The defendants are the duly appointed executors testamentary of the estate of the said late Dirk Cornelis Human, and reside in the Colony.

2. In the year 1869 the said Dirk Cornelis Human made his will, by which he appointed as

his sole heirs his children and grandchildren, and in case of the predecease of one or more of them then their lawful descendants by representation. In the year 1870 the said testator executed a codicil by which he declared that he appointed the children of his son Johannes Petrus Human as heirs in his place, and in case of the predecease of one or more of them then their lawful descendants by representation, and declared that it was his will that the inheritance which would have been due to said J. P. Human should be paid into the Guardians' Fund for the account of the said children, and that the said J. P. Human should draw the interest therefrom during his lifetime. Copy of extract from the said will material to this case and codicil are annexed.

8. The said testator died in the year 1872, without having revoked the said will and codicil, leaving at his death certain children, grandchildren whose parents were living, and grandchildren whose parents had predeceased the testator. At the testator's death there were living the said J. P. Human and five children of the said Human, including the plaintiff, who was born in 1868.

4. The said J. P. Human refused to abide by the terms of the codicil and elected to claim his legitimate portion, which was paid out to him, viz., the sum of £341 8s. 9d.

5. Thereupon the defendants, as executors aforesaid, liquidated the said estate, and filed certain accounts showing the amount of £8,908 2s. 11½d., less the said sum of £341 8s. 9d., available for distribution in terms of the said will and codicil. In the said accounts the executors awarded certain sums to the children of the testator *per capita*, and to his grandchildren, whose parents had predeceased the testator, but the defendants did not award any sum whatever to the plaintiff in terms of the will, but in terms of the codicil the defendants awarded a certain sum to the children of the said J. P. Human, including the plaintiff, and deducted therefrom the amount of the aforesaid legitimate portion.

6. The plaintiff claims and submits that the said accounts are wrongfully and improperly framed upon the following grounds: (a) That by virtue of his being a grandchild of the testator, the plaintiff is entitled to be awarded a share as an heir; (b) that in terms of the said will all the children and grandchildren of the testator living at his death are entitled to share equally as heirs; (c) that in terms of the said codicil the executors are bound to award to the five children of J. P. Human, including the plaintiff, the whole of the share of the inheritance which would have belonged to J. P. Human, and that they are not entitled to deduct therefrom the legitimate portion paid to the said J. P. Human.

7. The defendants deny that the plaintiff is

entitled to the claims set forth by him, and refuse to amend the said accounts.

Wherefore the plaintiff prays for an order declaring: (a) That he is entitled to be awarded a share as heir under his grandfather's will equally with the other heirs; (b) that the defendants are bound to award to the five children of J. P. Human (including the plaintiff) the whole of the share which would have come to J. P. Human as heir under his father's will, and are not entitled to deduct therefrom the legitimate portion of the said J. P. Human; (c) that the defendants are bound to amend the accounts filed by them and to frame proper accounts accordingly; (d) that the defendants be ordered to pay to the plaintiff such amounts as shall be awarded to him upon such amended and proper accounts; (e) alternative relief with costs *de bonis propriis*.

The defendants admitted paragraphs 1 and 4 of the declaration, but they denied paragraph 6. As to paragraphs 2 and 8, they craved leave to refer to the terms of the will and codicil of the testator.

The defendants said that in liquidating the testator's estate they treated the children of the testator's children who predeceased him as inheriting *per stirpes* in place of the deceased parent, and they craved leave to refer to the liquidation accounts filed with the Master.

The testator had six children, three predeceased him, and the other three are the plaintiff's father, who died in February, 1893, the second-named defendant, and one Cornelia Human, married in community of property to the first-named defendant.

When the plaintiff's father repudiated the said will and codicil, the defendants deducted from the portion due to him under the said testamentary dispositions the amount of the legitimate portion, paid him the said portion, and paid the balance into the Guardians' Fund.

Thereafter, and up to the death of plaintiff's father, the Master paid him the interest upon the said balance.

The plaintiff became of age in or about 1884, but up to the present time has not interfered with but has acquiesced in the distribution of the estate as above set forth, and is now barred from disputing the same by the said acquiescence and lapse of time.

The defendants finally said that they had acted in a *bona-fide* manner throughout in the administration of the estate of the plaintiff's grandfather, and had interpreted the will as though the testator meant his children to be heirs, and in case of any child predeceasing him, that the children of such child should succeed *per stirpes* to their parent's rights.

That all parties had acquiesced in the said interpretation and distribution, and the defendants submitted that it was too late now to reopen the

whole of the said accounts, and to alter the distribution of the said estate, which they had finally administered. Wherefore they prayed that the plaintiff's claim might be dismissed with costs. The replication was general, and issue was joined on these pleadings.

The clauses in the will and codicil were in the following terms:

Now proceeding to the election of heirs, I the testator declare hereby to nominate and to appoint my children and grandchildren to be my sole and universal heirs, and by predecease of one or more of them, then their lawful descendants by representation.

By virtue of the reservatory clause contained in my foregoing Testament, I testator declare this: I hereby for reasons me thereto moving, I declare by this to prelegate and to institute the children of my son Johannes Petrus Human as heirs in his stead, and by predecease of one or some of them, then their lawful descendants by representation, it being my will and desire that the inheritance devolving upon my son Johannes Petrus Human shall be placed in the Guardians Fund of this colony for their account and that said Johannes Petrus Human shall draw the interest thereof during his lifetime.

Mr. Juts appeared for the plaintiff; and Mr. Searle and Mr. Graham for the defendants.

Dirk Cornelis Human, son of J. P. Human and grandson of Dirk Human, deposed: My grandfather died in 1872. There were five children of his father. The youngest was Cornelia. She came of age last year. I became of age in November, 1884, and I lived with my father till 1889, when I got married. In 1890 I trekked to the Free State, and came back in March last year, and took steps to get my inheritance. My father died in the beginning of this year. Up to March last year I had no knowledge of what was in my grandfather's will. I did not agree with the manner in which the executors divided the estate. I saw Mr. Neethling on the matter. All the time I lived with my father I was working for my own livelihood.

Cross-examined by Mr. Searle: My father died on Mr. Neethling's farm, where he had lived for a great number of years. I have twelve brothers and sisters. Mr. Neethling supported, and continues to support, my younger brothers and sisters and my mother. The only money my father possessed was the interest he drew from the Master every year. In 1886 I signed a power of attorney to draw my inheritance. The money I was going to get was the money of which my father was receiving the interest—£298. About that time I put the matter in the hands of my agents, and told them everything. I am the eldest of our family. There are five of age.

Re-examined: During all these years I never saw the accounts. I went to the agents, and signed whatever they put before me.

By the Court: I did not know what was in my grandfather's will, but I know now. I cannot say when I first heard I had an interest under my grandfather's will. I did not know what my rights were. (Shown power of attorney.) I signed that power. I do not remember who asked me to do so.

Mr. M. M. Tait, attorney of the Supreme Court, deposed that a power of attorney was sent to him by Teubes & Jones, of Robertson. He went to the Master's Office to draw the money, and the money was refused. Witness then looked up the will and communicated with Teubes & Jones, after which counsel's opinion was taken.

For the defence, Fredrik Neethling deposed that he was married to Cornelia M. Human, one of the children of the testator. The testator left three children, all of whom were still alive. Witness's wife was one of them. Witness was executor under the will, and the other executor was Hans Jurie Human. Testator died on 7th May, 1872, and there was a sale on 14th June, and assets all realised. Mr. Dempers framed the account. The estate was finally administered, and it came to about £4,700 without the charges. The estate was distributed in equal portions among the children of the testator. (Account handed in.) There was no objection raised at the time, and the first objection that witness heard of was in July of last year. Plaintiff's father got the interest on his portion year by year. He was living on witness's farm. Plaintiff all along knew about this arrangement. He, too, lived on the farm.

Cross-examined: All the other children were satisfied. He had told them about the case. They did not like to pay back into the estate. Plaintiff's brothers and sisters were satisfied. They knew that they were entitled to some money.

Johannes P. Ulrich, a clerk in the office of Mr. Paul de Villiers, deposed that he went to the Master's Office and inquired about the money, having the power of attorney signed at Storms-vlei. The money received from the Master was duly remitted.

Mr. Juts, for the plaintiff, contended that the will as it stood was perfectly clear in its meaning, and no forced construction should be placed upon it to ascertain what the testator might have meant. The legitimate portion must be first paid out of the estate before the shares of the heirs can be ascertained.

Mr. Searle urged that the will and the codicil must be read together in order to arrive at the testator's intention. He was seventy-two when he died, and he could never have intended that all his grandchildren, twenty-two in number, should be called as heirs simultaneously. He could not

have intended children whose parents were alive to succeed. Read in the light of the codicil this appeared clear. Where the will is doubtful the codicil may be looked to for explanation. Generally on the case counsel cited the following authorities: *Van Schoor's Trustees v. Executors of Muller* (8 Searle, 181); *Bresler v. Kotzé* (2 M., 444); and *Wentzel v. Brink's Executors* (3 C.T.L.R., 258). *Van Leeuwen Cens. For.* (3, 5, 84), Voet (23, 5, 17, 20). See also *Neostad Dec. Cur.* 15. *Grotius Introd.* (2, 18, 22) and *Schorer's Notes* (187).

Mr. Justice Upington referred to *Van Leeuwen's Commentaries* (3, 8, 13) and to the case there cited decided by the Court of Holland on 30th April, 1659. *Korstiaan Dirkzy van Zyl v. Heirs of Kryn Hendricks van Swanenburg*

Mr. Juta, in reply, cited *Pretorius v. Pretorius* (3 Juta, 293).

Cur ad vult.

Postea (June 6th).

The Court delivered judgment.

The Chief Justice said: The testator by his will appointed his children and grandchildren as his heirs and, on predecease of one or more of them, their lawful descendants by representation. The main question to be determined is whether he must be deemed to have intended to institute his children as simultaneous or as successive heirs, in other words, whether all the testator's grandchildren were intended to be instituted or only those whose parents, being children of the testator, had predeceased him. By a codicil to his will, the testator instituted the children of his son Johannes Human as heirs in his stead, and directed that his said son should draw only the interest on the amount which would have devolved on him as heir. After the testator's death in 1872, his son Johannes claimed his legitimate portion. The defendants as executors accordingly paid him the legitimate portion and awarded to his children, of whom the plaintiff was one, the balance only of Johannes's share, after deduction of such portion, and paid such balance into the Guardians' Fund. The executors, moreover, treated only those grandchildren of the testator whose parents had predeceased him as heirs together with the children of those of the testator's children who had predeceased him *per stirpes*. The plaintiff objects to the liquidation account on the ground that he and his brothers and sisters ought to have been treated as heirs together with the testator's surviving children, and that in addition to such inheritance the executors ought to have awarded to them the full inheritance which would have devolved on their father without any deduction of the legitimate portion. The question whether the testator intended to institute as his immediate heirs all his grandchildren, including those whose parents sur-

vived him, is one of construction. *Prima facie*, there would seem to be a strong probability that the testator could not have intended to make the children of his surviving children heirs together with their parents, and to place them on exactly the same footing as the children of his predeceased children. If, however, the language used by him leaves no doubt that such was his intention, the Court would have to give effect to it, whatever *a priori* probability there might exist in favour of the opposite view. But the language is not so precise as to leave no room for serious doubt as to what the testator really intended. That being so, the Court is entitled to call in aid any canon of construction that has been established by decided cases, or by the Dutch authorities. No decided case of our South African Courts has been quoted, but the case of "*Van Zyl v. Van Swanenburg*," decided by the Court of Holland on 30th April, 1659, is quite in point. In that case the testator had appointed as his heirs the children and grandchildren of one Blommandaal, and it was held that in the lifetime of such children and grandchildren, the children alone were called to the inheritance to the exclusion of the grandchildren, who were considered only to have been called in the case of the predecease of their parents. *Van Leeuwen* cites this case in his *Commentaries* (3, 8, 13, C. J. Kotzé's translation), and adds that if children are instituted together with their parents, as if the testator says, "I appoint John, his children and further descendants, as my heirs," it is not considered that they are all called together to the inheritance, but the one before the other, and on failure or predecease of one the other comes in his place by substitution. And in his *Censura Forensis* (part 1, bk. 3, ch. 5, sec. 34), the same learned author says: "Where a person has at the same time instituted his children and grandchildren, or his brothers and their children, such children and grandchildren, or brothers and their children, as the case might be, will, in case of doubt, succeed not simultaneously but successively, nor *in capita* but *per stirpes*." As I have already remarked, the terms of the will leave the matter in doubt, and adopting therefore the rule of construction recognised in Holland, I am of opinion that the executors were right in not treating the plaintiff and his brothers and sisters as heirs under the will, their father (Johannes) having survived the testator. I am further of opinion that by his codicil the testator intended to institute the children of Johannes as heirs in respect of their father's share only. The usufruct of that share was reserved for Johannes during his lifetime. He claimed, as he lawfully might under the old law, that his legitimate portion be paid to him, and, inasmuch as the testator had not put him to his election to take

either the usufruct of the whole inheritance alone or his legitimate portion alone, the executors were justified in paying him his legitimate portion, and the balance into the Guardians' Fund for the benefit of his children. The plaintiff objects to the award of such balance only. If more is to be awarded the required sum would have to be deducted from the inheritances of the other heirs, and there is no authority to support the adoption of such a course. The testator's children took their inheritances in equal shares, and if one of them claimed his legitimate portion those only who were by the codicil substituted in his place as heirs can suffer by the claim. The judgment of the Court must therefore be for the defendants with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Findlay & Tait; Defendants' Attorneys, G. Montgomery Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice HUGHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

VAN DER BYL AND CO. V. SEALE. { 1893.
May 18th.

Mr. Molteno applied for judgment under rule 829 for £84 15s. 8d., together with interest.

Granted.

GENERAL MOTIONS.

PERFECT V. PERFECT.

Mr. Graham, on behalf of petitioner, moved for a rule nisi requiring his wife to show cause why petitioner should not be admitted to sue her *in forma pauperis* in an action for divorce, by reason of her alleged adultery.

The Court made the order.

WIESE AND ANOTHER V. MOSTERT.

Mr. Searle for applicants; Mr. Juta for respondent.

This was an application for a commission to take the evidence *de bene esse* of the defendant, she being eighty-two years old and blind, and too infirm to travel.

The Court made the order.

SAMUELS V. SAMUELS.

Mr. Graham, on behalf of petitioner, Elizabeth Samuels, applied for a rule nisi requiring her

husband to show cause why petitioner shall not be admitted to sue him *in forma pauperis* in an action for divorce, by reason of his alleged adultery.

Granted.

WILLIAMS V. WILLIAMS.

Mr. Tredgold applied for leave to applicant to serve the *intendit* and notice of trial at same time as edictal citation in the suit between the parties. He also asked that the return day be extended to 12th July.

Granted.

BERRY V. BERRY.

Mr. Molteno said this was the return day of the rule in this case. Defendant had removed to East London, and the service had not been effected. He now asked that the return day be extended to 12th June.

Granted.

WYNBERG MUNICIPALITY V. } 1893.
CLAYTON, N.O. } May 18th

Nuisance—Offensive water—Interdict.

This was an application upon notice calling upon the respondent, as representing the Secretary of State for War, to show cause why he should not abate a nuisance caused by the discharge of noisome and offensive water or other matter from the property known as and used for the Military Camp at Wynberg. And also why a perpetual interdict should not issue restraining the respondent in his aforesaid capacity from discharging, or allowing to be discharged, from the military camp aforesaid, or from any other property within the said Municipality, and vested in Her Majesty's Principal Secretary of State for War, any noisome, offensive, or injurious liquid or matter into or upon any ditch, drain, or property of or within the said Municipality. And why the respondent should not be ordered to pay the costs of the application. The facts are as follows:

Some three or four years ago the military authorities at Wynberg constructed a cement drain from the camp to Durban-road, and thence under the street by a barrel drain into Riebeck-street, which is connected with Wolfe-street.

This drain was constructed and connected after permission had been given by the Municipal Council on condition that no noxious or offensive water was to be sent down.

After the drain had been constructed constant complaints were lodged with the Municipality as to the condition of the drain.

The military authorities in 1890 constructed

filter beds, but still the drain caused a nuisance which was reported from time to time by the Sanitary Inspector. Letters were then addressed to the military authorities by the Municipality, to which replies were received stating that care would be taken to prevent a repetition of the nuisance.

In January, 1892, the present respondent took up the position that the Municipality itself was to blame for the alleged nuisance and not the military authorities.

Subsequently things became so bad in Wolfe-street that Mr. Farmer, who resides at Maynardville summoned the Municipality to abate the existing nuisance.

Thereupon the Municipality took steps to interdict the military authorities.

Mr. Searle (with him Mr. Watermeyer) now appeared in support of the present application, and read the affidavits of the Municipal Clerk, of Drs. Reitz and Silke, of the Mayor and other residents of Wynberg, which went to show that an undoubted nuisance did exist. Counsel also read the report of Dr. Marloth, who analysed eight samples of water from the camp taken at different parts of its course down the drain, and where it crosses the road in Riebeeck-street. The report showed that all the samples submitted to analysis contained cesspool sewage and other offensive matter. Mr. Searle contended that permission had been given to construct the drain on the distinct understanding that clean and not refuse water would be allowed to flow into it. The filter beds were wholly insufficient. The military authorities acknowledged that at times there was a nuisance. If there were other nuisances it was not for the respondent to say so as long as the camp nuisance continued. The military authorities must abate their own nuisance. The testing had been careful—samples taken at both sides of the barrel drain were found to contain cesspool drainage. Every sample was distinctly impure. Persons living on the spot were of opinion that the nuisance was entirely due to the water from the camp. The inspector had found the nuisance high up in Riebeeck-street. Bad smelling water was seen to be discharged from the military hospital. All kitchen and ablution water was apparently swept into the drain. Mr. Farmer had forced the Municipality to take action. He attributed the entire nuisance to the military authorities. The military authorities must remove their refuse water as ordinary householders do. (See bye-law, section 8).

Mr. Rose-Innes, Q.C., appeared for the respondent, and read his and other affidavits, which stated that the nuisance only commenced in Wolfe-street, and was not due to the water coming from the camp, but to the drainage coming from houses in the vicinity of Wolfe-street. Counsel contended that the drastic remedy of a perpetual interdict

would not be applied unless the evidence were clear that the nuisance were a continuing one. "*Swaine v. G.N. Railway Company*" (10 Jur. N.S. 191). If any doubt existed the respondent was entitled to the benefit of it. If the Court were of opinion that the weight of evidence was in favour of the applicants, then time should be allowed the military authorities to abate the nuisance. "*Claremont and other Municipalities v. Ohlsson's Cape Breweries*" (1 C.T.L.R., 84).

The Chief Justice said: It was admitted in this case that the War Department were not ratepayers of the Municipality; and therefore no question of implied contract arose binding the Municipality to supply proper drains to receive the refuse water from the respondent's quarters. It was clear from the evidence that there was a continuous flow of water from the military camp at Wynberg to the drains of the Municipality. The whole evidence also showed that the water, in the first instance at all events, was impure. It had been used for washing purposes—either of persons or of things. It partly consisted of the ablution water, partly of kitchen water. Now, kitchen refuse water when it came to stagnate was as impure and noisome as any other water could possibly be. The War Department had from time to time admitted that there was something in the nature of a nuisance, and from time to time promised to remedy it. They attempted to do this by constructing filtering beds, and the questions arose: Have these filtering beds served the purpose for which they were constructed? Whether the water passing through those filtering beds still contained such ingredients as to form a nuisance when they came into the Municipal drain? Now, if the War Department had not caused the water to come down, or if it was not their fault that noxious matter came down, they could not be held liable; but if they were the persons who had sent that noxious matter down they must be held liable if the ingredients were of such a nature that when the water came into the Wolfe-street drain it there stagnated and caused a nuisance. The main defence of the War Department was that the nuisance in the Wolfe-street drain was caused by flows from private gutters and not from the camp. It was quite possible—and his lordship thought it was true—that some houses did send noxious matter into this drain. But that did not excuse the War Department. The Municipality was now proceeding against the upper proprietors in order to get the nuisance abated. The War Department, at all events, had produced no tests of water taken after it had left the filtering beds. On the other hand, the Municipality had produced several samples tested by an experienced chemist, who had found that everyone of these samples contained very

noxious matter indeed. It was said that no opportunity was given the War Department of attending when these samples were got. It was clear, however, that a sergeant and a corporal were present when one sample was taken, at a time when there was no water going into the drain except military water, and the sample so taken was the worst submitted to the expert for examination. Then they had also several witnesses stating on behalf of the Municipality that not only had the water been tested on several occasions, but after it had passed the military drain there was a very offensive odour coming from it. There was no doubt as to the evidence of Colonel Clayton and Captain Massey, who found it perfectly pure; but that evidence might be reconciled in this way: so long as water passed over the military ground it passed down a cement drain, down a steep declivity, and passing at that rate water (even if it contained offensive ingredients) would not emit offensive odours. After going down Riebeck-street and meeting the drain at Wolfe-street, it went off at right angles. Now the Riebeck-street drain passed through a comparatively level street and the water then stagnating emitted noisome odours. It was, therefore, quite consistent with Colonel Clayton's evidence and Captain Massey's evidence, that wholly noxious ingredients might have come down even after passing the filter beds — especially in view of the fact that the War Department had not taken the trouble to have the water tested after it had passed the filter beds. The Court must therefore come to the conclusion that the water was noisome and had been noisome for some time, and steps should be taken by the War Department to remedy it. The Court thought that an opportunity should be given to the War Department to devise some means by which the offensive water could be removed. If they could not do it, then they would have to adopt the suggestion of the Municipality and employ the persons deputed by the Municipality to carry away such water. The suggestion thrown out by Mr. Innes would be adopted by the Court, and as this was the rainy season, not much harm could follow on the delay, and therefore four months would be given to the War Department to devise some means of abating the nuisance. The application for a perpetual interdict would be granted with costs, but suspended for four months.

Their lordships concurred.

[Applicants' Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. Van Zyl & Buissinac.]

REHABILITATION.

{ 1898.
May 19th.

On the motion of Mr. Sheil, the Court ordered the rehabilitation of Burgert C. Maree.

REGINA V. THERON.

{ 1898.
May 19th.

Scab Act of 1886—Inspector—Licence—Waiver.

Where a licence, whether original or a renewal, has been granted under Act 28 of 1886, section 5, there can be no prosecution under section 6 during the period of such licence.

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate for Barkly East.

The summons alleged that the accused did, on or about the 4th April, 1898, and at the farm Forwood, in the district of Barkly East, wrongfully and unlawfully contravene section 6, Act 28 of 1886, in that he did fail to make proper and diligent efforts to cleanse from scab certain 730 sheep and thirty-seven goats, his property.

The evidence of the inspector went to show that he examined the sheep belonging to the accused for the first time on 8rd November, 1892, when he found 800 sheep in the possession of the accused, two of which were infected with scab. The inspector then gave the accused a licence for seventy days, and an order to dip. The sheep were re-inspected on the 16th February, 1898, on which date the inspector found 700 sheep and twenty-two goats, one of the sheep being infected with scab. The inspector then gave the accused another licence for thirty days, and an order to dip. The sheep were again inspected on the 1st April, 1898, when the inspector found 780 sheep and thirty goats, one of the sheep being badly infected with scab. A licence for thirty days was then issued to the accused, but before this licence had expired, he was summoned for contravening the Act.

The defence of the accused was that he had dipped all his sheep, and that on the 8rd April he examined them, but could find no scab.

The accused was found guilty, and sentenced to pay a fine of £1. From that sentence he now appealed.

Mr. Juta was heard in support of the appeal, and contended (1) that there was no evidence to show that the defendant had not done all he could to eradicate the disease, and (2) the accused could not be convicted whilst the licence was in operation.

Mr. Giddy, for the Crown, as to the onus being on the accused, referred to Act 28 of 1886, section 4.

The Chief Justice said: I regret to say that this conviction cannot be supported. The summons charged the defendant with having failed to make proper and diligent efforts to clean from scab 730

sheep and thirty-seven goats, the property of the said Theron. The evidence showed that on April 1 a licence was granted in terms of the 5th section of the Act allowing the appellant to keep the sheep for a further period of thirty days. Now whether this was taken as a renewal of a pre-existing licence or as a subsequent original licence, it would be equally clear that there could be no prosecution under the 6th section. If it were an original licence, then clearly the 6th section could not apply, and in the same way if it were a renewal. The words of the section are "After due inspection by the inspector and due inquiry by him it shall be found that they are still infected, and that the owner has failed to make proper and diligent efforts to cleanse them, he shall be liable to a fine." But in this instance, when the inspector gave the licence on 1st April, he waived all right to prosecution within a period of thirty days. That would be the sole object of a licence. I can see no other object for granting a licence except to give the owner time—thirty days—within which to clean the sheep, and therefore the owner could not be prosecuted until that time had expired. The conviction must be set aside.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Fairbridge & Ardenne.]

BERTHAM V. WOOD.

1898.
May 19th,
June 6th.

Res judicata — Magistrate's jurisdiction — Future rights.

The requisites of a valid defence of res judicata are that the new demand must be of the same thing that has already been finally adjudicated upon, that it must be for the same cause and between the same parties.

Where, in an action for interest on a bond or rent under a lease, a defence has been raised virtually claiming a declaration that the bond or lease is invalid, a decision upon such claim would be res judicata between the same parties in an action for subsequent interest or rent when the same defence is raised on the same grounds.

In an action for rent in a Magistrate's Court it is not competent for the defendant to claim such a declaration which would be binding on the plaintiff in future.

It is, however, a general principle that a Magistrate has no jurisdiction to try a claim to which a bona-fide defence is taken having the effect, if valid, of extinguishing the

plaintiff's claim and involving the decision of questions beyond his jurisdiction.

Held, therefore, that a Magistrate's Court has no jurisdiction to try a claim for rent on an agreement of lease without actual occupation, when a bona-fide defence is taken denying the validity or existence of such agreement.

This was an appeal from a decision of the Resident Magistrate for Queen's Town in an action in which the present appellant (plaintiff in the Court below) sued the respondent (defendant): First, for the sum of £5 for rent owing by the defendant to the plaintiff in respect of the use and occupation by the defendant of the shop and premises situate on erf 42 in the Hexagon, Queen's Town, the property of the plaintiff, for the month of February, 1898; and second, for the sum of £7 18s. 4d., as and for and being the Municipal and Divisional rates assessed upon the said shop and premises for the year 1892, which rates the defendant promised and agreed to pay, but which he had failed and neglected to pay, and which the plaintiff, as owner of the said premises, was compelled to and did pay.

The defendant, before pleading, excepted to the summons on the ground that he was a member of a partnership firm, and that the other partners should have been joined with the defendant in the action.

In case the exception were overruled the defendant pleaded:

1. That he did not use or occupy the premises for the month of February, 1898, as alleged in the summons, and that on the 30th of December, 1892, he gave due notice, through his agents, of his intention to quit the said premises on the 31st January, 1893, which he accordingly did.

2. As to the sum claimed for Municipal and Divisional rates, the defendant denied liability thereon, and said that there was no agreement or understanding between him and the plaintiff whereby he (the defendant) was to pay the said rates.

At the conclusion of the plaintiff's evidence, the defendant excepted to the jurisdiction of the Court, on the grounds that the Court was asked to decide that a contract or agreement was subsisting between the parties for a period of five years, and consequently any judgment or decision of the Court on that point would be binding the future rights of the parties to the suit.

This exception was sustained.

The material facts appear from the Magistrate's reasons, which are *inter alia* as follows:

In the course of his evidence the plaintiff said: "My claim for rent is on a lease which has still

four years to run. I intend to claim rent from defendant month after month until this lease expires."

He also explained that on the 26th February, 1892, defendant agreed to hire the premises in question for a period of five years, commencing from 1st March, 1892, rent £5 per mensem, and payment of Municipal rates and Divisional Council rates by the lessee, and he puts in a memorandum of this agreement which he says was left with defendant for completion, but which defendant neglected to do.

Defendant on the other hand denies that any such agreement or lease was ever entered into.

Under these circumstances it seems to me that the question I am called upon to determine is whether or not there was a contract for five years involving an amount of over £800, and hence I have come to the conclusion that the question involves future rights, and cannot therefore be decided by this Court ("Wienand v. Goldschmidt," 5 E.D.C., 257). The plaintiff's attorney relied on the decision in "De Wet v. Jooste" (2 C.T.L.R., 178), but in that case the defendant did not deny that any lease or agreement had been entered into. The letting was admitted, and the only question before the Court was whether the rent claimed (two months) was due or not. Should it, however, be decided on appeal that I have taken an erroneous view of the law, and that the question I had to try was simply whether or not one month's rent was due and payable by defendant to plaintiff, then I would wish to add that I believe plaintiff's evidence, that all the circumstances, in my opinion, go to show that defendant did agree to enter into a five years' lease of the premises, and that should the case be remitted to me for judgment, I would give it in favour of plaintiff with costs.

The plaintiff now appealed.

Mr. Searle was heard in support of the appeal, and contended that the Magistrate erred in upholding the exception because although the summons claimed £5 as rent for use and occupation yet the real question which the parties came into Court to decide was, was rent due under the lease? It is admitted for the respondent that the summons must be regarded as though for rent due under the lease.

Lindenberg v. Bosman (Buch. 1870, p. 51) was strongly in favour of plaintiff. That case had not been overruled.

As to *res judicata*, see 8 Burge, p. 1088. Here the defendant would not be debarred from any judgment of the Magistrate in this suit by contesting the validity of the lease in any court that had jurisdiction to decide it. The only exception taken was that "future rights were bound."

That was clearly a bad exception (Act 20 of 1856, section 8, sub-section 8). Future rights refer

to questions of *status*. Examples are given in the section and the other instances must be *epidem generis*. Riversdale Divisional Council v. Pienaar (8 Juta, 252), De Wet v. Jooste (9 Juta, 89), Rindwaldson v. Weiss (Buch. 1874, p. 150).

To determine whether "future rights" are in question the summons has only to be looked at.

If according to Riversdale Divisional Council v. Pienaar an action for future rights could not be met by the exception *res judicata*, neither would such an exception avail in this case in an action for future months' rent.

Mr. Graham for the respondent contended that the real point at issue was the validity of the lease. The summons in the case was for use and occupation. The appellant was in this dilemma, if he relied on the words of the summons he must have failed in the Court below, for there had been no use and occupation during February; if the validity of the lease was the issue it was beyond the Magistrate's jurisdiction and the exception was a good one. De Wet v. Jooste (2 C.T.L.R., 178) Wienand v. Goldschmidt (5 E.D.C., 257) was directly in point. The decision in Taylor v. Haupt (5 Juta, 22) did not affect the parties to the sale.

He also referred to Abner Major v. John Makettra (1 E.D.C., 47) and Rendwaldson v. Weiss (Buch. 1875, p. 159).

In Lindenberg v. Bosman (Buch. 1870, p. 51) there was no appearance for the respondent. The objection in the Court below was that the amount claimed was not on a liquid debt, but for interest on a bond the validity of which was in question.

If the Court decided that the Magistrate had jurisdiction in an action for interest on a bond the validity of which was in dispute the decision should be overruled, as it is in conflict with Vermaak v. Cruywagen (8 Menz, 465) which was not cited in Lindenberg v. Bosman.

Counsel referred to the remarks of the Chief Justice in Taylor v. Haupt and Lindenberg v. Bosman.

The Magistrate was justified in taking cognizance of the exception after the defendant had joined issue. Riversdale Divisional Council v. Pienaar (8 Juta, 252).

Mr. Searle in reply.

Cur ad vult.

Postea (June 6th.)

The Court delivered judgment.

The Chief Justice said: The plaintiff sued the defendant in the Magistrate's Court, Queen's Town, for £5 as rent for the month of March, 1892, in respect of premises alleged to have been let to the defendant under an agreement for a five years' lease, and for rates and taxes alleged to be due by the defendant for the year 1892. The defendant pleaded what appears to me to have been a perfectly *bona-fide* denial of the agreement, and

excepted to the Magistrate's jurisdiction on the ground that the action was one whereby rights in future could be bound. The Magistrate decided that he had no jurisdiction, and against this decision the plaintiff has appealed. I cannot assent to the view that the action was one whereby rights in future could be bound. Such rights would only be bound in case a judgment in regard to one month's rent could be pleaded in bar to an action for subsequent rent by means of the *exceptio rei judicate*. By the law of England the requisites of such a defence are that the judgment relied upon must have been between the same parties, and that the same point must have been at issue as in the suit in which the defence is pleaded. Under our law, however, there is a third requisite, namely, that the same thing must have been demanded. It is laid down in the Digest (16, 17, 207) as a rule of law that a matter once adjudged is accepted as the truth—*res judicata pro veritate accipitur*. The meaning of the rule is that the authority of *res judicata* induces a presumption that the judgment upon any claim submitted to a competent Court is correct, and this presumption being *juris et de jure*, excludes every proof to the contrary. The presumption is founded upon public policy, which requires that litigation should not be endless and upon the requirements of good faith, which, as said by Gaius (Dig. 50, 17, 57), does not permit of the same thing being demanded more than once. On the other hand, a presumption of this nature, unless carefully circumscribed, is capable of producing great hardships and even positive injustice to individuals. It is in order to prevent such injustice that the Roman law laid down the exact conditions giving rise to the *exceptio rei judicate*. These conditions are thus summed up by *Ulpianus* (4, 18, 5), *Haec autem exceptio non aliter agentis obstat quam si eadem questio inter eandem personas revocetur; itaque ita demum nocet si omnia sunt eadem, idem Corpus, eadem quantitas, idem jus, eadem causa petendi, eademque conditio personarum*. In *Grotius' Introduction* (8, 49, Schorer's note, Maasdonp's translation) the rule is pithily stated as follows: "The exception holds whenever the same thing, with respect to which a judgment having the force of a final or definitive sentence has been given, is again demanded by the same plaintiff of the same defendant and upon the same grounds. The same thing is understood to include the case where, the whole having been first demanded, a part is afterwards claimed." *Voet* (44, 2, 8) says: "Under no other circumstances is the exception allowed than where the concluded litigation is again commenced between the same persons, in regard to the same thing, and for the same cause of action, so much so, that if one of these requisites is wanting, the exception fails."

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He then gives examples of the same thing being claimed, in every one of which the thing so claimed formed part of the original claim. For instance, where judgment has been pronounced upon a claim for a female slave it binds the parties in an action for the subsequent progeny founded upon the same cause of action. The case of interest on a debt is referred to by *Ulpian* (Dig. 44, 2, 28), who says that if such interest has been claimed, and judgment given thereon, no fear need exist that the *exceptio rei judicate* would be prejudicial in an action for the principal, for, adds he, it would not be competent to plead the exception and, if pleaded, it would be of no avail. *A fortiori*, judgment upon a claim for twelve months' interest would not be *res judicata* in an action for twelve subsequent months' interest, nor would judgment upon a claim for one month's rent necessarily be *res judicata* in an action for subsequent rent. This latter point was decided in the case of "*De Wet v. Jooste*" (9 *Juta*, p. 289). If, however, the defendant by his defence has in effect claimed a declaration that the bond or the lease, as the case might be, was itself invalid, a decision upon such a claim would thereafter be binding between the same parties. In the Magistrate's Court, however, it would not be competent for the defendant in a case like the present to claim a declaration which would be binding on the plaintiff in the future. A judgment in respect of one month's rent would not be *res judicata* in an action for subsequent rent, and on the other hand the Magistrate would have no jurisdiction to decide a claim advanced by the defendant in respect of the validity of the lease involving a rental of £80 per annum. The action, therefore, is not one whereby rights in future could be bound. But it does not follow that the Magistrate would have jurisdiction. The general principle is well established that a Magistrate has no jurisdiction to try a claim to which a bona-fide defence is taken having the effect, if valid, of extinguishing the claim and involving questions beyond his jurisdiction. Thus in "*Brady v. Michiel*" (8 *Juta*, 179), the claim was for a liquid debt of £80, and the defence was that the defendant had a counter-claim for a liquidated debt which extinguished the plaintiff's claim, and that such counter-claim was in excess of the Magistrate's jurisdiction. This Court held that the Magistrate had properly refused to try the case. Where, however, the defence, even if valid, would not have the effect of extinguishing the claim the Court has upheld the jurisdiction of the Magistrate. Thus in "*Smith v. Ramsbottom*" (8 *Juta*, 98), this Court held that a counter-claim for unliquidated damages in an amount exceeding the limit of the Magistrate's jurisdiction does not oust the jurisdiction in respect of the claim in convention. Nor would his jurisdiction be ousted if the defence

involved no question beyond the limit of his jurisdiction, for then it would be competent to him to decide upon the claim as well as counter-claim. Accordingly, in "*Riversdale Divisional Council v. Pienaar*" (8 Juta, 252), where, to an action for road rates, the defendant pleaded in effect that his property was not within the division of Riversdale, and the Court held that the defence as well as the claim for road rates was quite within the jurisdiction of the Magistrate to decide upon. The general principle to which I have referred is supported by the case of "*Vermaak v. Cruywagen*" (8 Menz., 465), which was decided as long ago as 1888. It was there held that a Resident Magistrate has no jurisdiction to give judgment for a sum less than the amount to which his jurisdiction extends, but which is claimed as interest on a bond for a sum greater than the amount to which his jurisdiction extends, when the defence pleaded is a denial of the validity of the bond and the bond debt. Since the publication of the report of the case of "*Lindenberg v. Bosman*" (Bueh. 1870, p. 51) it has been assumed to conflict with the previous case of "*Vermaak v. Cruywagen*," but on reference to the original records I find that no such conflict exists. In the case of "*Lindenberg v. Bosman*," there was no plea in the Court below alleging the invalidity of the bond, so that the published report is incorrect in stating that the bond was there in dispute. The only defence there raised was that the Magistrate had no jurisdiction. This was the only defence raised in the Court below in the case of "*Taylor v. Haupt*" (5 Juta, 22). On appeal, it was urged that the plaintiff's commission for the sale of a wine business was dependent upon the validity of the sale itself, but, in the absence of any plea denying such validity, and of anything to show that such a plea would have been valid as between the parties to the action, the Court remitted the case to the Magistrate for trial. In the case of "*Wienand v. Goldschmidt*" (5 E.D.C. 257) the Eastern Districts Court held that the Magistrate had no jurisdiction to try an action for £9 10s. as rent on an agreement of lease for three years at £88 a year, the defendant alleging a breach of contract by the plaintiff, which entitled the defendant to cancel the agreement. It does not appear from the report whether this allegation was made by way of special defence, and if it was, I entirely agree with the decision, but not on the ground that it was an action whereby rights in future could be bound. The true ground of the want of jurisdiction in that, as in the present case, appears to me to be that a *bona-fide* defence was raised which would, if valid, have the effect of entirely extinguishing the plaintiff's claim for rent, and which involved the question of the validity of a lease which it was beyond the Magistrate's jurisdiction to adjudicate upon. In

the present case, the defendant did not occupy the premises during the month for which rent was claimed. The summons claimed rent for use and occupation, but it was agreed by counsel that the arguments should be based upon a summons claiming rent under an agreement of lease. The defence denying the agreement having been specifically raised, the Magistrate properly refused to try the case, and the appeal must be dismissed with costs.

Mr. Justice Buchanan said: The form in which this suit was originally brought in the Magistrate's Court is admittedly bad, the plaintiff suing for use and occupation of premises which were not in defendant's possession at all, but of which the plaintiff had the key. The defendant, on the other hand, in taking exception to the Magistrate's jurisdiction on the ground that rights in future would be bound, has not, it seems to me, properly raised the issue which both parties wished to have decided. That issue is the validity of a lease for five years, reserving about £800 of rent. This issue would not be within the cognisance of the Magistrate, the amount involved being far beyond his jurisdiction. But in argument this has been treated as an action for two months' rent upon a lease, and it is contended that the Magistrate ought to have overruled the exception taken by defendant, as the amount claimed is not in excess of the limit. The respondent relies on the authority of the case of "*Wienand v. Goldschmidt*" (5 E.D.C. Rep., 257) as being directly in point, and supporting the Magistrate's decision. In that judgment I concurred at the time. It is urged, however, that it is in conflict with the cases heard in this Court. The strongest case cited for the appellant is that of "*Lindenberg v. Bosman*" (Bueh. S.C. Rep., 1870, p. 51), where it was held that a magistrate had jurisdiction to try a claim for £95 interest due on two bonds for £100 and £300 respectively, notwithstanding (according to the report) that in respect of the bond itself there was a dispute. There was no appearance for respondent on appeal, and the earlier case of "*Vermaak v. Cruywagen*" (8 Menz., 465) to the direct contrary, was not cited. I have, however, referred to the records in "*Lindenberg v. Bosman*," and as far as can be gathered from them, it does not appear that the dispute was about the validity of the bonds, but rather the exception taken was to the excess of jurisdiction in that the amount claimed was not a liquid debt. At any rate the ruling on that case could be supported on that ground. If this be so, we therefore have the distinct authority of "*Vermaak v. Cruywagen*," that a magistrate has no jurisdiction in a claim for interest on a bond, the validity of which is denied, against which is the allegation in the report in Lindenberg's case, the correctness of which is

doubtful. It may be noticed in passing, that after the decision in Lindenberg's case the Legislature, by Act No. 21, 1876, section 2, excluded mortgage bonds from the liquid documents upon which magistrates had conferred upon them an extended jurisdiction, though this exception was subsequently removed by Act No. 43, 1885, which reverted to the words of the former Magistrate's Court Act, No. 20, 1856. In the case of the "Riverdale Divisional Council v. Pienaar" (8 Juta, 252), the Court held that the Magistrate could decide on a claim for rates, although the defendant denied that the farm rated was wholly within the division represented by plaintiffs. But there it was clearly shown that as the action related to past rates only, the amount of which was within the Magistrate's jurisdiction, and a judgment given in respect of those rates would not bind either the present or future proprietors in respect of future rates, which might or might not ever be assessed. The head-note of the report of the case of "De Wet v. Jooste" (9 Juta, 259) at first sight would appear as if that case was an authority here. But the facts show that it is clearly distinguishable. There the fact of the letting was not in dispute, and in giving judgment the Chief Justice expressly said that the summons contained no claim depending for its validity upon any decision whereby future rights could be bound. The defence set up was rather *ajus tertii* than a denial of the lease. None of the other cases cited carry the matter any further. In deciding this appeal the difficulty is not so much in ascertaining the law, but in applying it to the special facts of the case. This appeal, it appears to me, can only be allowed if it is held that the decision will not become *res judicata* on the question of the validity of the lease, but only as to the two months' rent sued for. If the action had been brought in a competent Court the parties could once for all have raised the question they wished decided, but if, by selecting the Magistrate's Court, the plaintiff is allowed to sue month by month for rent, which he declares it is his intention to do, the validity of the lease cannot be disposed of during its whole term in the form so selected. No doubt the defendant could bring an action to test the question in a superior Court, but that would be shifting the onus usually laid on claimants. It is not the practice to require the pleadings to be too full and complete in the Courts of Resident Magistrate, but rather to be satisfied with their sufficiently disclosing the case to be tried. The pleadings here are incomplete, and as they stand, the plaintiff is not entitled to judgment. If amended as agreed, they should be so amended as to raise the issue of the validity of the lease, which is the real dispute between the parties, and in that event the Magistrate could not try the

case. In my opinion this appeal ought to be dismissed.

Mr. Justice Upington: I was impressed for some time by the argument that it would be very inconvenient to have a series of contrary decisions by different sets of magistrates, but after carefully considering the question, and looking at the authorities, I am satisfied that the judgment should be as stated.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, John Ayliff.]

SEARLE AND GILBERT AND SULLIVAN V. BONAMICI AND PERKINS } 1898.
"PROPRIETORS OF THE LYRIC" } May 19th.
OPERA COMPANY.

Dramatic Copyright—Operas—3 & 4 Wm. IV., cap. 15, section 1—5 & 6 Vic., cap. 45, section 20—Infringement.

S., the assignee of the right of representing Gilbert and Sullivan's operas in the Colony applied for an interdict restraining B. and P. from giving representations of the operas in a town in which they had advertised to appear.

A rule nisi operating as an interim interdict was granted.

On the return day the rule was discharged, but the respondents were ordered to pay 10 per cent. of the gross proceeds, which might be realised by representations of the operas in question, to the Deputy Sheriff of King William's Town to abide the result of any action which might be brought by the applicant for infringement of his rights.

This was the return of a rule nisi granted yesterday, and which operated as an interdict, upon an application made under the 5 and 6 Victoria, cap. 45, restraining the respondents from playing or performing the operas known as "The Mikado," "Princess Ida," and "Iolanthe" or any of the other operas of Gilbert & Sullivan.

The rule together with the petitions upon which it was granted had been served on the respondents, who were at the time in King William's Town, by wire.

The facts upon which the rule was granted are as follows: On 15th December, 1892, Gilbert & Sullivan ceded, assigned, transferred and set over the sole and exclusive right of representation and performance in the Cape Colony of their operas (registered at Stationers' Hall) for a period of three years from the 1st January, 1893, to the

first-named applicant by an indenture bearing date the 15th December, 1892.

The respondents, the proprietors of the Lyric Opera Company, were at the date of the application playing at King William's Town and they had advertised that they would play the "Mikado," "Princess Ida," and "Iolanthe" (three of the operas the sole performing right of which was assigned to the first-named petitioner) to-night (19th May), and the four following nights.

Searelle alleged that he would be prejudiced unless the respondents were restrained from playing the said or any other of the operas enumerated above, and he prayed for an interdict restraining them.

Mr. Rose-Innes, Q.C., for the applicants, now moved that the rule nisi be made absolute.

Mr. Juta, for the respondents, opposed the rule being made absolute on the grounds that the operas had not been registered in the Colony, and even if registered that the Copyrights Act did not apply. Further there had been no notice of the cessation of rights. If the rule were made absolute forty members of the Opera Company would be thrown out of employment.

Mr. Rose-Innes, Q.C., in support of the rule, contended that it was clear from 8 and 4 Will. IV. cap. 4, section 1, that the author, or his assignee, of any dramatic piece was given the sole right of representing it at any place of public entertainment in the British dominions. The 5 and 6 Vic., cap. 45, section 20, extended that principle to musical compositions. It was clear that Searelle had the sole right of representing Gilbert & Sullivan's operas, and that the playing of these pieces by others than Searelle was an infringement of his rights. He cited *Buxton v. James* (5 De G. and S., 80).

The rule should be made absolute.

Mr. Juta in reply.

The Chief Justice said: The order of the Court will be that the respondents pay into the hands of the Deputy Sheriff of King William's Town 10 per cent. of the gross proceeds derived by them from the performance of any of the said operas in this colony, to abide the result of any action that may be brought by applicant for damages for infringement of his rights; the rule nisi to be discharged; costs to be costs in the cause.

Mr. Innes asked what would be the result if the company went to another town. Would the Deputy Sheriff of King William's Town receive the contribution no matter where the company was playing?

The Chief Justice: The order applies to all future performances "in this colony." The Deputy Sheriff of King William's Town will receive the money.

Their lordships concurred.

[Applicants' Attorneys, Messrs. Van Zyl &

Buissinac; Respondents' Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL CASES.

ROSS AND CO. V. WINTERBACH. { 1893.
May 25th.

Mr. Jones moved for provisional sentence for £84 18s. 9d., less £85 paid on account, on a promissory note.

Granted.

ROSS AND CO. V. BURGER.

Mr. Webber applied for provisional sentence on a promissory note for £21.

Granted.

POSNO V. DAVIS ALLEN.

Mr. Curry moved for judgment under rule 829 for £851 2s., with interest on £809 7s. 6d., from 28th February, 1898.

Granted.

Ex parte SCHRODER.

Mr. Shell moved for the admission of Ernest Schröder as an attorney and notary.

The Court ordered the admission, and the oaths to be taken at Kimberley before the Registrar.

REHABILITATION.

On the motion of Mr. Molteno, the rehabilitation of Johannes P. Roelofse was granted.

GENERAL MOTIONS.

In re KAFFRARIAN STEAM LANDING, SHIPPING, AND FORWARDING COMPANY. { 1893.
May 25th.

Liquidation—Company—Shares of absent shareholders.

Mr. Graham presented the report and the account framed by the official liquidators. The report stated that in May, 1892, the liquidators took over the assets of the company, consisting of 10,125 shares of £1 each, fully paid up, in the United Boating Company (Limited), and certain cash amounting to £1,174 16s. 8d. These shares had been distributed to shareholders in the pro-

portion of one share for each £1 of capital. After the distribution there still remained 449 shares in the United Boating Company, which the liquidators sold, after receiving a dividend on them, for £558 8s. 9d., which amount formed part of the balance for distribution. All debts had been collected, and all amounts owing by the company had been paid. The balance on hand for distribution (after providing for expenses of final winding up and for the remuneration of the official liquidators) was £1,174 16s. 8d., which would give 2s. 5d. in the £ to each shareholder. Seven shareholders had not sent in their shares to the liquidators, and for these shareholders there remained a sum of money. The liquidators now suggested that either the cash or the shares be handed by them to the Master, or the shares should be sold to the best advantage and the proceeds, together with other cash (amounts due under the final distribution, &c.), be handed to the Master for account of those concerned. The Court was, therefore, asked: (1) To make a final distribution of 2s. 5d. in the £ to shareholders; (2) to deal with the cash and shares due to the absent shareholders in the manner indicated; and (3) to fix the remuneration of the liquidators at £52 10s.

The Court, in terms of the liquidators' report, authorised the shares of absent shareholders to be sold and the proceeds paid to the Master, together with the cash in hand mentioned in the report on account of those concerned.

IN THE ESTATE OF THE LATE ANNA M. VAN HUYSTEEN.

Mr. Tredgold moved for leave to the executors testamentary to raise a loan on mortgage of the landed property of the estate, for the purpose of satisfying the debts thereof.

The Court made an order in terms of the application.

WILSON V COLONIAL GOVERNMENT.

Mr. Graham asked the Court to grant a rule nisi calling upon defendants to show cause why they should not be sued *in forma pauperis* in an action for damages.

The Court made the rule, returnable on the 12th June.

WIESE AND ANOTHER V. MOSTERT.

On the motion of Mr. Juta, this case, which was set down for last day of term, was postponed till 10th July.

Ex parte PAMLANA AND OTHERS. { 1898.
In re GOCENE'S ESTATE. { May 26th.

Will—Landed property—Directions as to sale.

Where a testator had directed the landed property in his estate to be sold, and the proceeds divided in certain proportions amongst his heirs, and the heirs (with the exception of one who was absent) both major and minor petitioned the Court for authority to the executors testamentary to pass transfer of the land to them in the like proportions to which they would have been entitled to the proceeds if the land were sold in terms of the will, the Court granted authority to the tutors of the minors qua tutors to purchase the land jointly with the majors at a price to be fixed by the Master.

The share of the absent heir to be paid into the Master's hands.

Mr. Juta presented the petition of Pamlana, Zondani, Zwadibanzi, Mdlungu, Ncanywa and Zwanana, natives residing in the district of Komgha.

The petitioners together with Kanayo, Skade, Tyunze, Goomo, Lali and Mgoloza were appointed sole heirs of the late Go Gocene by his last will and testament bearing date at Komgha the 28th day of September, 1888.

The petitioners and Kanayo (if still living) are majors, but the remaining heirs are minors.

Kanayo left the district of Komgha in or about the year 1877, and has not since been heard of nor are his whereabouts known.

The late Go Gocene directed by his will that the landed property in his estate, consisting of a certain farm in the district of Komgha, should be sold and the proceeds thereof distributed amongst his heirs in the proportions therein set forth.

The petitioners and the minors were desirous that in lieu of such sale of the farm they should receive transfer of the same in the like proportions in which they were respectively entitled to the proceeds.

They alleged that should the farm be sold out of the estate they and the minors would suffer considerable loss and damage, as they were relying upon retaining the said farm as their home and for the grazing of the live-stock of which they were possessed.

The petitioners prayed the Court to be pleased to grant an order authorising the executors testamentary to the estate of the late Go Gocene to pass transfer of the land to the heirs in the like proportions to which they were respectively

entitled to the proceeds of the same if sold, and further authorising the executors to hand over such live-stock as might be found due to the minors to Zoudani and Pamiana, who had been nominated guardians of minors in trust for them until they should have respectively attained the age of twenty-one years.

The petition was submitted to the Master who reported with regard to Kanayo's share that "it would perhaps be better that his share of the farm should be taken over by one or more of the major heirs at a valuation to be made by a sworn appraiser and that the purchase money should be paid to his credit in the Guardians' Fund."

The Chief Justice said: The Court had nothing to do with the majors, but as to the minors, the Court would authorise the tutors of the minor heirs in their said capacity to purchase the land mentioned in the petition jointly with the majors, at such a price as should be fixed by the Master, and pay the portion of the purchase price accruing to Kanayo into the Guardians' Fund.

Their lordships concurred.

[Petitioners' Attorneys, Messrs. Findlay and Tait.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN, and
Mr. Justice UPINGTON, K.C.M.G.]

HIRSCH V. GILL. { 1898.
May 26th.

Boundary—Transfer deed—Diagram—Road.

Where the diagram attached to a deed of transfer does not conflict with the description of the boundaries given in the body of the deed such diagram affords valuable evidence as to the boundaries of the land transferred.

The owner of land transferred a portion thereof by a deed which described such portion as being bounded on the west by "the remaining extent."

The diagram attached showed the middle of a certain main road as the western boundary, running then where it still runs.

Held, in an action brought by the owner of such portion against the owner of the remaining extent, that the middle of the road was the boundary between the two properties.

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This was an action instituted by Rosa Hirsch

against Professor James Gill, of Muizenberg, for a declaration of rights and for a perpetual interdict.

The declaration alleged that the plaintiff is the owner of a certain piece of ground situate in Muizenberg, which she purchased from one Max Heimann on the 17th August, 1890, being in extent 188 square rods and 74 square feet, transfer of which was duly passed to her on the 18th February, 1898, as per deed of transfer of the same date, and to which for greater certainty she craved leave to refer.

On divers occasions, since the plaintiff acquired the above-mentioned property, the defendant has wrongfully and unlawfully laid claim to a certain portion of the aforesaid property, and has interfered with the plaintiff's servants whilst lawfully employed on the aforesaid property.

The defendant has no right to the aforesaid property of the plaintiff or to any portion thereof.

The plaintiff claimed:

(a) A declaration of rights requiring the defendant to show by what right of title he asserts a claim to the aforesaid property of the plaintiff, or to any portion thereof, and failing to establish such right of title.

(b) A perpetual interdict restraining the defendant from wrongfully and unlawfully asserting a claim to the plaintiff's property or to any portion thereof, or from interfering with the plaintiff's servants whilst lawfully employed upon the plaintiff's property as aforesaid.

(c) A declaration that the main road to Simon's town is the western boundary of the plaintiff's property.

(d) Alternative relief.

(e) Costs of suit.

The plea, after admitting the formal allegations in the declaration, denied that the defendant had laid claim to any portion of the plaintiff's property or that he had interfered with her servants, and prayed that the plaintiff's claim might be dismissed with costs. The replication was general; and issue was joined on these pleadings.

The property of the plaintiff and the defendant at one time belonged to one Jan Pieter Frederik Kirsten. He acquired the property under two grants, one in 1811 and the other in 1840.

In 1864 Kirsten sold the land on the east side of the Muizenberg-road to Abraham Francois, who died in 1872, and his widow transferred it to Hendrik Albertyn: who in 1882 sold a portion of the land to Isidore Hirsch, husband of the present plaintiff, who in his turn, in 1886, sold a portion to Max Heimann. In 1890 Max Heimann sold it to the plaintiff, transfer being passed in 1898. The land on the west side of the road passed from the possession of Kirsten into that of Peacock, Captain Wood, Rathfelder, and Van Blerk, and finally into the hands of the plaintiff.

The deed of transfer passed in 1854 to Abraham Francis described the land sold to him as being bounded on the west by the remaining extent, but the diagram attached to the deed of transfer showed the main road to Simon's Town as being the western boundary of the property.

Mr. Shell appeared for the plaintiff, and M. Searle and Mr. Graham for the defendant.

Rosa Hirsch, plaintiff, deposed: I was married without community of property. My husband acts as my general agent. I bought the piece of land in dispute in 1890 from Mr. Max Heimann, and transfer was passed to me in 1893. I first heard from defendant with respect to this land on 26th April, 1891. He wrote saying that a portion of my fence was upon his ground, and requested me to remove my fence. I replied, "I shall comply with your wish if you come with your surveyor." (Diagrams of ground handed in.) He afterwards wrote again to me on 29th May, asking me if my husband had my authority to interfere with his men in replacing the beacon. I afterwards received a letter from defendant's attorney, offering to submit the dispute to arbitration, and I put the case in the hands of my solicitors. After that a summons was issued. Professor Gill has interfered with my servants while working on my ground.

Cross-examined by Mr. Searle: When I wrote to Professor Gill that I would comply with his request, I meant I would do so if he would bring a surveyor, and I would bring one, too. I would remove my fence if I were satisfied that he was entitled to any of my ground. But he has no right to my side of the road.

Isidore Hirsch deposed that the property which his wife now owned was purchased by him in 1882. The western boundary was the main road to Simon's Town. Shortly after witness purchased the property he received a letter from Gill, claiming portion of the ground, but defendant brought no action to assert his title. In 1891, defendant brought an action against witness for trespass, and succeeded. After this witness surrendered his estate, and did not pay the costs. Witness sold various portions of the land to different individuals, but Professor Gill never took legal action. Last August, defendant interfered with witness's servants, and witness told them to go on with their work. Defendant had written various letters to plaintiff, and this action was instituted as a final settlement of all disputes.

Cross-examined: Witness went to Muizenberg in August, 1881. Professor Gill came in December of the same year. There was a whalebone fence on the property, which defendant claimed, and which witness pulled down. The present fence was put up in 1886. In obedience to an order by the Divisional Council, witness put up a mason beacon

on his ground at the private passage leading to the beach.

Nicolas Bredenkamp, a servant in the employment of Mrs. Hirsch, said in August last, when he was working on the same line as the fence, Professor Gill came up and told him that if he did not desist he (Professor Gill) would have a warrant taken out against him. Witness then told his master, and Mr. Hirsch came up, and he continued the work inside Mrs. Hirsch's property.

Henry Areher, constable at Muizenberg, deposed that he had received instructions from both parties to this suit to arrest one and the other.

By the Court: And which did you lock up?—Neither, my lord.

Henry Albert Bruyns deposed that he was seventy years of age, and he had known the main road to Simon's Town for about sixty years. It had not altered its position since he knew it.

Joseph Norman, overseer of roads for the Divisional Council, said he was sixty-nine years of age, and had known the main road to Simon's Town for some fifty-eight years. It had not altered in any way. The bridge had been touched up within the last few years.

Henry Albertyn purchased the land which now belonged to Mrs. Hirsch in 1872. While he was in possession no one ever interfered with him, except when Professor Gill came. He had known the main road for about forty years, and it had never been changed.

By the Court: The road never went so far up as the whalebone beacon.

Nicolas van Blerk, aged seventy-one, who sold the property on the west side of the road to the defendant, knew the beacons that formerly stood at Hirsch's, and deposed that the road, which was the boundary, had never been altered. He did not know who put up the beacons.

Peter Kirsten, aged seventy, deposed that all the land in dispute formerly belonged to his father. The main road was the boundary, and the main road had always remained the same.

Cross-examined: Did not know anything about Peacock's beacon. Could not say where the whalebone beacon stood.

By the Court: When his father held the land he occupied the upper side of the road.

Henry Peter Hansen, who had done work for Professor Gill, deposed that he removed the whalebone beacon in obedience to Professor Gill's instructions. The beacon had now been shifted to the Simon's Town side.

James Bisset, Government surveyor, had surveyed the ground in 1886. (Shown diagram.) The main road was shown on the western boundary.

Cross-examined: Had assumed the correctness of a survey made by Mr. Ralph Arderne, and made his diagram accordingly.

Charles Gerald van Reenen, clerk in the Deeds Office, gave in the original deed of transfer from Kirsten to Abram Francis.

This closed the plaintiff's case.

For the defence,

Professor James Gill, defendant, deposed: I purchased the property in August, 1881, from Mr. Van Blerk. Two large whalebone beacons on the beach side of the road were pointed out to me as marking the boundary. One of these beacons was dug out in 1882 by Mr. Hirsch. The other one stands near Mr. Albertyn's house, and this one was taken out, and a mason one put up. I know the late Mr. Hugo. He pointed out the beacons. The former owners of this property are all dead. There were no beacons on the upper side of the road. The whalebone beacon that has been referred to was a portion of the fence. The other one was 18 feet back from the road. When I bought the property it was entirely open. Opposite my frontage there was no fence. On the east and west there was a fence. There was no fence alongside the road. I had a survey made by Mr. Ackermann, and in consequence of what I was told I approached Mr. Albertyn, and then Hirsch, with a view to a compromise, but nothing was arranged. Subsequently there was some correspondence between us and relations were strained. I was present at the sale of the Earl of Stamford's property. Hirsch was there. As regards this dispute as to the boundary, I have always been anxious to have the matter amicably settled. Mr. Hare compromised with me in respect of my claims on the sea side of the road. I instituted an action against Mr. Hirsch for trespass in 1891, and succeeded. My costs have not been paid yet by Mr. Hirsch. Within the last fortnight a whalebone beacon has been removed.

Cross-examined by Mr. Sheil: Mr. Torbet's house is built on land claimed by me. I claim 18 feet in from the road. I received £10 from Mr. Hare. I have not given him transfer yet. The ground which Mr. Hare has got measures 50 feet in depth. Mr. Ralph Arderne told me that Mr. Hirsch was very angry that he could not bring his property on to the upper side of the road.

Re-examined: I am perfectly willing to deal reasonably with the other proprietors. Mr. Watson surveyed the land for the Colonial Government, not for me. I do not agree with his survey.

Ernest Landsberg, who said in six weeks he would be ninety-four, deposed that he landed at Simon's Town in 1818. He was a member of the Road Board for twelve years. When he arrived the new road was only made as far as Diep River. Knew the road running past Professor Gill's property. In times past there had been deviations—very slight deviations—made in the road. If there was any deviation it was trifling, and towards

the mountain. The road was straighter now than it used to be.

Cross-examined: Knew more of the roads to the interior than towards Simon's Bay. Could not say if the road had been defined when he was a member of the Board.

Mr. G. H. Muller, auctioneer, spoke to having conducted the sale according to the plan (handed in) of the Earl of Stamford's property. Hirsch was present.

Mr. Hutton Watermeyer, Government land surveyor, shown diagram of Professor Gill's property, deposed that the boundary line extended to between 30 and 40 feet beyond the road on Mrs. Hirsch's property. He saw one of the beacons and the place where one had stood.

Cross-examined: The survey was made by chain from beacons pointed out by Professor Gill.

Mr. J. Purland, Assistant Resident Magistrate of Simon's Town, was called to put in the record in the case of the "Queen v. Isidore Hirsch," a prosecution under the Land Beacons Act, and for the purpose of putting in an affidavit sworn to by Mr. Peacock, one of Professor Gill's predecessors in title, and having reference to the beacons formerly standing on Hirsch's ground.

Mr. Sheil objected to the evidence as being inadmissible, Hirsch being no party to the present case. The maxim *res inter alios acta* applied.

Mr. Searle contended that it was admissible, and relied on "Executors of Schonnberg v. Executors of Vos" (1 Juta, 825).

The Court sustained the objection.

Mr. Sheil was heard in support of the plaintiff's case, and contended that the present case differed from "Barrington and Others v. The Colonial Government" (4 Juta, 408) and "Beaufort West Municipality v. Wernich" (2 Juta, 56), as there was no disagreement here between the transfer deed and the diagram. The evidence was clear that since the sub-division of the farm in 1854 all the plaintiff's predecessors in title regarded the main road as the western boundary of their property. The plaintiff was entitled to the remedy which she sought.

Mr. Searle urged that no part of the grant made to Kirsten, sen., in 1811 was conveyed to Francis in 1854. The evidence was clear that one of the beacons of the property on the west side of the main road stood on Hirsch's ground until it was removed by him. Counsel referred to Act 7 of 1866, section 47 (a) (b), and to "Jansen v. Conradie" (1 O.T.L.B., 236).

The Chief Justice suggested that the declaration might be amended by inserting a prayer that the main road to Simon's Town should be declared the western boundary of the plaintiff's property.

The amendment having been made,

The Chief Justice (after stating the facts) said: The land of the plaintiff and the defendant

formerly belonged to the same owner. The transfer to the plaintiff's predecessor in title states that the property so transferred is bounded on the west by "the remaining extent." The defendant is now the owner of such remaining extent, and he can only claim that portion of the original property which remained after the rest had been cut off. The body of the plaintiff's transfer deed, therefore, does not assist the Court in determining the boundary line and it becomes perfectly legitimate to refer to the diagram attached to the transfer deed in order to ascertain what the boundary was intended to be. The case of *Barrington v. Colonial Government* (4 Juta 408) did not decide, as has been sometimes supposed, that the diagram can be of no service in fixing the boundaries of land. If the diagram is inconsistent with the terms of the grant or with the beacons as pointed out at the original measurement, then the diagram must yield to the evidence afforded by the body of the grant or by such original beacons. But where no such inconsistency exists the diagram affords the most valuable evidence of what was intended to be granted or transferred, and more especially in the case of surveys made since complete accuracy has been insisted upon in the Deeds Office. In the present case the middle of the Simon's Town main-road appears on the diagram as the western boundary of the plaintiff's property. The evidence satisfies me that the road now runs exactly where it ran when the transfer and diagram were made. That road, therefore, must in my opinion be held to be the true boundary between the two properties and the defendant must be interdicted from interfering with the plaintiff's servants while lawfully employed upon the plaintiff's property, which is hereby declared to extend on the west to the middle of the road.

The defendant must pay the costs of this action. Their lordships concurred.

[Plaintiff's Attorneys, Messrs. C. & J. Buissinac; Defendant's Attorney, J. Hamilton Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

WETZEL V. WETZEL. { 1898.
May 29th.

This was an action for restitution of conjugal rights, failing which for divorce. Mr Molteno for plaintiff; defendant in default. The parties were married in Cassel, in Germany, in 1874, and proof

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of the marriage was given by putting in what purported to be a copy of the protocol.

Elizabeth Wetzel, plaintiff, deposed: I was married to defendant at Cassel, in Germany, in January, 1874. In 1888 I followed my husband to the Colony. We lived at Somerset West for some years, and came into Cape Town in 1887. I lost my little girl in May, 1888, and in May, 1889, my husband deserted me. He told me that he did not want to live any longer with me—that I could go and get another man, and he would get another girl. Since then I have been a dress-maker at Lady Grey, and now I have acquired a small business at Aliwal North. A year ago defendant offered to receive me back provided I supported him.

The Court granted a decree of restitution of conjugal rights with costs. Defendant to return to or receive plaintiff on or before 30th June, failing which the Court would grant a rule nisi calling upon defendant to show cause by the 12th July why a decree of divorce should not be granted with costs. On the 12th July the rule was made absolute with costs.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne]

WILLOUGHBY V. WILLOUGHBY. { 1898.
May 29th.

In this matter Mr. Searle appeared on behalf of defendant, and asked the Court to make an order that she was entitled to a certain sum of money out of plaintiff's estate to defend an action instituted by her husband for restitution of conjugal rights, which was set down for Thursday. The amount asked for was £20.

Mr. Watermeyer, for plaintiff, objected, but offered to defray the cost of bringing witnesses from Wynberg if defendant were allowed to proceed *in forma pauperis*.

The Court made an order that defendant should be allowed to appear to defend the action in *forma pauperis*, plaintiff undertaking to pay the expenses of not more than three witnesses from Wynberg.

LOUW V. LOUW. { 1898.
May 29th.

Judicial separation — Account — Action — Compromise.

This was an action for judicial separation, instituted by Mrs. Anna Tobia Louw (born Van Schoor) against her husband, Mr. Johannes Albertus Loubser Louw.

The declaration alleged that the plaintiff and defendant were married without community of

property at Cape Town on 2nd July, 1888, and that the said marriage was still in full force and effect.

That there was issue of the said marriage one daughter, a minor of the age of three years, and the plaintiff was also the mother and guardian of three minor children, the issue of her former marriage with one Albertus B. W. van Niekerk, now deceased.

At divers times, between the month of January, 1891, and the present time, the defendant wrongfully, unlawfully, and cruelly struck and otherwise ill-treated the plaintiff, and had so abused, threatened, and intimidated her that it had become impossible and insupportable for her to continue to live with him as his wife.

The plaintiff was entitled to the life use and occupation of certain two farms called Middlepost and Remhoogte, situated in the Cape and Malmesbury divisions respectively, and registered in the name of her first husband, the said late Albertus B. W. van Niekerk.

The defendant had since his marriage with the plaintiff used and occupied the said farms, and claimed to continue to use and occupy them.

The defendant had from time to time received moneys belonging to the plaintiff and her minor children by her former marriage, which he had appropriated and invested in his own name.

The plaintiff claimed:

(a) An order of judicial separation *a mensa et thoro* between herself and the defendant.

(b) Custody of the minor child.

(c) An order compelling the defendant to deliver up possession to the plaintiff of the two farms Middlepost and Remhoogte aforesaid.

(d) An order directing the defendant to account for all moneys and other assets received by him, and belonging to the plaintiff and her minor children, and to pay over such moneys, to cede any bonds which might have been passed and registered in his name, and which were the proceeds or investment of any such moneys as aforesaid, and to deliver up any other assets received by him which were the property of herself or her minor children.

(e) Alternative relief, with costs of suit.

The defendant in his plea denied the cruelty, and said that owing to the plaintiff's conduct towards him it was impossible for him to live any longer with the plaintiff, and that he was ready and willing to consent to a judicial separation.

He alleged that he was not aware that the plaintiff was entitled to the life use of the two farms referred to in the declaration, nor did he admit that she was.

But he said that in the year 1890 he and the plaintiff agreed that in consideration of the defendant paying interest and other debts due upon the said farms, he should have the use and occupation of the same for a period ending April,

1896; that he had performed and was always ready and willing to perform his part of the said agreement, and had been since 1890 in use and occupation of the said farms in pursuance of the said agreement.

He admitted that he had received certain moneys belonging to the plaintiff which he had invested, and said that he had always been ready and willing to account to the plaintiff, and he annexed an account showing the dealings between himself and the plaintiff.

Wherefore he prayed, save as to the separation, that the plaintiff's claim might be dismissed with costs. The replication was general, and issue was joined on these pleadings.

Mr. Rose-Innes, Q.C., and Mr. Shippard appeared for the plaintiff, and Mr. Juta and Mr. Jones for the defendant.

Anna Tobia Louw, plaintiff, deposed: In July, 1888, I was married by ante-nuptial contract to defendant, who was then an overseer on my farm. Before my marriage with Mr. Louw I was married to Mr. Van Niekerk, who died in 1886 by him I had three sons, who are all miners. By my marriage with Mr. Louw I have one little girl, who is now nearly four years old. Before the birth of my daughter and subsequent to that date, there had been frequent quarrels between my husband and me, chiefly about my property. My former husband, Mr. Van Niekerk, left me the farms of Middlepost and Remhoogte, in the Cape Division. When I married defendant he managed Middlepost. I did not make over the property to him. We often had words about these farms and about my sons. In the beginning of 1891 I remember defendant drove me into his room one night, and hit me with a horsewhip. My son, who is eighteen, interfered, and he then struck him, and threw him down. He then said he would go for his gun, and kill me and himself. My sister and my son remonstrated with him. Towards the end of last year he assaulted me again, and seized me by the throat. The cause of the quarrel on this occasion was about my son's pigs. He told me that they should be removed from the farm. Early in this present year I was obliged to leave the farm. He told me in presence of three witnesses that he did not wish to live with me any longer, that he was sick of me, and that he wished me to leave. In the afternoon of the next day I left, and went to a neighbouring farm. I afterwards went back for my clothes. I wanted to take the child, but he would not give it to me. Under the will of my former husband, Mr. Van Niekerk, I have a life interest in the farms, and I took over the movables at their inventory value. I paid certain debts and claims with the proceeds of the crop reaped at the end of 1886. The defendant came as overseer at the end of 1887. He got a

salary. He brought no stock or other property with him. I married him in 1888. There was a bond over one of the farms for £500. Defendant paid it off with my money. I had £200 left me by my father. Mr. Louw invested that in his own name. Mr. Louw is a good farmer. He has worked the farm Middlepost well. When I left there was at least £70 in cash in the house, and a number of outstanding claims. There were also some debts.

Cross-examined by Mr. Juta: I have two brothers who live near me. I never complained to my brothers about my husband's conduct. I have a passionate temper, but not quite so bad as Mr. Louw. I have used strong language towards him in the presence of people. I once struck my child with the sharp edge of a knife, but it was by accident. I have occasionally given her a beating. I once struck my husband. When I married defendant my estate was not practically insolvent. We were married in Cape Town. When we were driving out to the farm, I made no arrangements with my brother Cornelius about paying off the debt on the farm. I admit Mr. Louw has been a good farmer. I cannot say he has been a father to my boys. He is now educating two of my boys. He took one of my boys away from school and put him on the farm. In March, 1890, I never came to an agreement with my husband that he was to take over the farms. I know the farm of Romheogte had been let to one Loftus. I never told Loftus that I had made over the entire business to my husband. I never agreed to my husband letting the farm to Loftus.

The Chief Justice: Is there no chance of these parties coming together? There is no reason why they should separate. The squabble is really about the property, and if that matter is settled, I think they might come together.

Plaintiff: I wish to remain mistress of my own property.

The Chief Justice: If the matter were carefully considered, I think counsel could come to some arrangement. The husband will have, of course, to restrain his temper. He will have to treat his wife and her children kindly, and she will have to bear in mind that he is her husband and that she owes him some respect.

The Court then adjourned to allow of the parties coming to some arrangement.

On resuming after luncheon,

Mr. Rose-Innes, Q.C., stated that the following compromise had been agreed to between the parties: That plaintiff and defendant live together as husband and wife; that defendant do pay the plaintiff the sum of £800 in three equal instalments, payable within three months, defendant to be entitled to all stock, movables, and grain, &c., on Middlepost and elsewhere, as his own property (excepting plaintiff's furniture and

clothes). That defendant do pay all costs of plaintiff. That defendant do cancel the bond of £500 ceded to him. That defendant do pay £76 to plaintiff per annum for the education and clothing of her two minor sons until April, 1895. That defendant be entitled to work for his own account and benefit the two farms Middlepost and Remhoogte, and receive the rents until 1st April, 1895, he paying all interest, taxes, insurance rates, and do pay all outstanding debts. That defendant do cede the bond of £200 inheritance received by him to plaintiff as guardian of her minor children, and pay the costs of the action.

The Chief Justice expressed his satisfaction at the terms of the compromise. There had, he said been loss of temper on both sides, and perhaps some violence on both sides, but that was not a reason why the parties should not live together. Both seemed to have regretted what had occurred, and his lordship was satisfied that if in the future the parties would give and take, they would live happily together. The Court would make an order in terms of the consent paper put in.

[Plaintiff's Attorney, O. O. de Villiers; Defendant's Attorneys, Messrs. J. C. Berrangé & Son.]

KING V. TRUSTEES OF ASBESTOS COMPANY. 1893. { May 29th.

Mr. Juta, on behalf of his client, applied for leave to pay into court the £14,000 security for the appeal in this case to the Privy Council.

The Chief Justice asked if there was not a cross-appeal in this case.

Mr. Juta: I understand there is, my lord, but we have nothing to do with that.

The Court made the order.

HANAU AND HOFFA V. SPOONER. { 1893. May 29th, May 31st.

Lease — Occupation — Rent — Damages — Action.

This was an action instituted by Messrs. Hanau and Hoffa, of Victoria West, against Mr. Sydney Edmund Spooner, of Somerset West, for the sum of £191 19s.

The declaration alleged that on or about the 26th of July, 1892, the plaintiffs leased certain hotel premises, situate at Victoria West, and known as the Commercial Hotel, together with certain fixtures, furniture, and movables appurtenant thereto, their property, to the defendant, for a period terminating on the 31st December, 1892, at a rental of £15 per month, and upon certain terms and conditions. (A copy of the lease was annexed to the declaration.)

By clause 8 of the said lease the defendant had the option of renewing the said lease for one year from 1st January, 1898, at a rental of £17 10s. per month, by giving one month's notice, in writing, and provided all rent was paid.

The defendant did not renew the said lease in terms thereof, but remained as before in use and occupation of the premises and things appurtenant thereto, let under the said lease, during the months of January, February, and March, 1898, pending negotiations for another lease, and in the month of April the defendant, without notice, abandoned the said premises, and handed up the keys thereof to the Standard Bank at Victoria West.

The defendant did not pay the rent for the month of December, but only paid the sum of £5 14s. on account thereof, and did not pay any rent for the months January to March inclusive, or give any notice of his abandonment, though the defendant was bound to give plaintiffs at least one month's notice before leaving the premises.

There is due to the plaintiffs the sum of £9 16s., balance of rent due for December, 1892, the sum of £60, being the rent for the use and occupation by the defendant for the months January to March, 1898, inclusive, and the sum of £15 in lieu of the rent for the month of April, for which notice should have been given.

During the period of the said lease, or during the period of the said use and occupation, the defendant wrongfully and unlawfully removed, appropriated to his own use, and sold certain fixtures, furniture, and movables upon and in the said premises, and leased to him, of the value of £16 7s. 6d.

By the terms of the said lease the defendant was bound to repay to the plaintiffs any premium paid by them for insuring the said premises and movables leased against loss by fire. In the month of April, 1892, the plaintiffs paid £5 16s. 6d. as an insurance premium on the said premises and movables, which said sum is now due and repayable by the defendant.

The defendant was bound to keep the buildings and premises leased in thorough order and repair, but the defendant, in breach and neglect of his duty, allowed the buildings and premises to fall into a bad state of repair and order, and when he abandoned the premises in April, 1898, he left the same in a bad and disgraceful condition, and the plaintiffs were put to great loss, expense, and damage in putting the said premises and buildings in a fit and proper state and order, and by reason of the said premises the plaintiffs have sustained damage, loss, and expense to the extent of £100.

The plaintiffs claimed:

1. The sums of £89 13s, £5 16s 6d, £16 7s 6d, and £100, with interest *a tempore mora*.

2. Alternative relief.

3. Costs of suit.

The defendant, in his plea, admitted that there were negotiations for a further lease of the premises after the lease above referred to had terminated, and that he remained in possession of the premises during the months of January, February, and March, 1898.

He said that it was agreed between himself and the plaintiffs in March, 1898, that the plaintiffs should put the premises in a thorough state of repair, and that there should be a new lease of the premises to him, the defendant, to date from March 1.

The plaintiffs thereafter refused to put the premises in a proper state of repair, whereupon defendant gave notice to plaintiffs' agent, as he was entitled to do, that he would vacate the said premises at the end of March, that he handed the key to plaintiffs' agent, and that plaintiffs let the premises to one Shaw, upon a lease commencing from the month of April.

The defendant said that he had settled with the plaintiffs the whole of the rent due under the lease as per account annexed to the plea, showing the sums paid to plaintiffs and sums paid to other persons on their behalf and at their request. He admitted that he had not paid for his use and occupation of the premises during the months of January, February, and March. He said that the sum of £84 10s., being £11 10s. for each month, was a proper and sufficient sum to pay in respect thereof, and was agreed upon as such, and he tendered the said sum.

He said he removed the fixtures and furniture under the *bona-fide* belief that he was entitled to do so, he having paid for the same to the former occupiers of the hotel premises, but that thereafter he had the same returned to the premises where they now were at the disposal of the plaintiffs, and he said that the value of the said articles was £12 10s. and no more.

He admitted that he owed the amount of the fire insurance premium, and he tendered the same.

He denied the allegation that he suffered the premises to fall into a bad state of repair or order, or that the plaintiffs were compelled, in consequence of any acts of his (the defendant), to expend the sum of £100, or any portion thereof, or that the plaintiffs had sustained damage for which he (the defendant) was responsible in £100, or in any amount.

He admitted that when he left the premises in March they were in a bad state of repair, and he said that the plaintiffs constantly promised to put them in a proper state, but failed to do so. Subject to his tender of £40 5s. 6d., he prayed that the plaintiffs' claim might be dismissed with costs.

The defendant claimed in reconvention the sum of £60. He alleged that in or about February, 1898, the premises were in a bad state of repair, that he called upon the plaintiffs to put them in a

proper state and make them water-tight, that they agreed to do so, but thereafter neglected and failed to carry out their agreement, in consequence whereof his movables therein, and especially clothing belonging to himself and family, cigars, and cigarettes were seriously damaged by water, and that he sustained loss in the sum of £60.

The replication was general, and issue was joined on these pleadings.

Mr. Juts and Mr. Barber appeared for the plaintiffs, and Mr. Searle and Mr. Graham for the defendant.

Mr. Isidore Hanau, the representative of the plaintiffs, gave evidence in support of their claim.

P. F. Macdougall, Town Clerk, Victoria West, called for plaintiffs, deposed that he visited the Commercial Hotel along with Mr. Hanau on 11th April, and found every portable article removed.

John Burger, Victoria West, deposed that three stoves which had been put in as fixtures were wrenched out of the masonry and carried away.

For the defence, Sydney E. Spooner, defendant, deposed that he was now residing at the Strand, where he had a hotel. He entered on possession there in April. He went into the Commercial Hotel, Victoria West, last July. Witness did not act directly through Mr. Hanau, but through Hanau's agent. Witness bought every article of furniture from the previous tenant except the billiard-table, the bar, two baths, and a tank. An inventory was made out, and the money was paid down. Witness, at his own expense, executed important repairs, as the house was barely habitable. Witness did a fairly good bar business, but could not do any hotel business to speak of. The accommodation was totally inadequate, and the roofs and walls wanted thorough renovation. He had sustained very considerable damage owing to the bad condition of the premises generally. His cigars, cigarettes—his own clothing and many of his wife's garments were destroyed by rain coming from the roof. Witness gave due notice to the plaintiff that he intended to leave, but plaintiff did not accept notice. At least he paid no attention. Witness did not leave surreptitiously, but quite openly.

Cross-examined: Witness paid £250 for the whole furniture in the hotel.

Further corroborative evidence was given bearing on the condition of the house by Alfred Goldman, J. S. le Sueur, D. C. Begley, Dr. Bremeridge, and Richard Skallam.

After argument,

The Chief Justice said as to the item of £9 6s., it was quite clear that under the contract that item was due, in respect of the rates which defendant claimed to deduct from the rent. In regard to the rent for January, February, and March, it was clear that unless a definite contract had been come to afterwards, the amount payable

for the use and occupation of the hotel during these three months would be at the rate of the previous lease, namely, £15 per month, which would make £45. In regard to the rent for April, no notice whatever was given of the termination of this lease on the part of defendant, who simply handed up the key and left. If he remained their tenant, he ought to have given plaintiffs notice. Mr. Searle had relied on the fact that Mr. Hanau had arranged to give occupation to another tenant from the 1st March. But in point of fact he did not do so, and defendant remained in possession. The new tenant came into occupation only in the middle of April, and for that occupation in April plaintiff received £5 15s. Taking all these separate amounts into consideration, the judgment of the Court would be for the plaintiffs for £81 16s. 6d. As to the claim for damages on the part of plaintiffs, his lordship said that there could only be absolution from the instance because of the exceedingly conflicting nature of the evidence. Then as to defendant's claim in reconvention, there was no evidence that plaintiffs knew of the condition of the particular part of the roof complained of. There was nothing to lead him to suppose that a heavy rain would have effected a leakage. The two claims must be fairly set off against each other, and there still remained £81 16s. 6d., for which the Court would give judgment with costs.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. Findlay & Tait ;
Defendant's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN
and Mr. Justice UPINGTON, K.C.M.G.]

LOGAN V. COLONIAL GOVERN- { 1898.
MENT. May 30th,
May 31st.

Contract—Railway Refreshment Rooms—
Breach—Damages.

This was an action instituted by Mr. James Douglas Logan, of Matjesfontein, against the Commissioner of Crown Lands and Public Works for specific performance of a contract (or in the alternative for £50,000 damages) entered into between the plaintiff and Charles B. Elliott, the General Manager and Assistant Commissioner of Railways and Public Works, and in such capacity representing the Colonial Government, on the

14th September, 1892, by which the sole and exclusive right of supplying refreshments at the different refreshment-rooms then in existence, or which might thereafter be established on the several lines of railway in this colony or elsewhere belonging to and under the control of the Colonial Government was granted to the plaintiff, together with the right of supplying refreshments on such trains as the said Government might authorise, for a period of ten years, reckoned from the date on which the refreshment-rooms then in existence should be handed over to the plaintiff. The right to continue the said contract for a further period of five years upon certain conditions was also granted.

Thereafter, on or about the 21st November, 1892, the said Elliott, acting as aforesaid on behalf of the Colonial Government, wrongfully and unlawfully gave notice that the said Government repudiated the said contract and considered the same cancelled. The plaintiff refused to accept the said notice.

The plaintiff claimed :

(a) That the defendant be ordered by this honourable Court to carry out and perform the said contract, the plaintiff hereby tendering to perform his portion thereof.

Or, in the alternative, in default of the said contract being carried out, that the defendant be ordered to pay the sum of £50,000 as damages.

(b) Such alternate relief as may seem meet

(c) Costs of suit.*

The defendant filed the following plea :

For a plea to the declaration the defendant says as follows :

1. As to the first paragraph of the declaration, the defendant says that as Commissioner aforesaid he administered the Cape Government Railways; in regard to such administration and in the discharge generally of his duties as Commissioner he represents Her Majesty the Queen in her Colonial Government. Subject to the above, he admits the allegation in the said first paragraph.

2. As to the second paragraph, the defendant admits that on the 14th September, 1892, a contract was entered into between the plaintiff and the said Elliott, having reference to certain rights in regard to the supply of refreshments on the several lines of railway belonging to and under the control of the Colonial Government. He also admits that the said Elliott was authorised by the defendant to sign the said contract. For the terms, conditions, and stipulations of the said contract, the defendant refers this honourable Court to the original thereof when produced.

3. As to the third paragraph, the defendant says that after the execution of the contract as afore-

said, Her Majesty's Colonial Government, acting in the public interest, refused to be bound by the terms of the said contract, and desired that the same should be considered as cancelled. This was notified to the plaintiff by the said Elliott, acting on behalf of the Government, on or about the 21st November aforesaid.

4. As to the fourth paragraph, he admits that the plaintiff has tendered to perform his portion of the said contract, and is desirous of having the same carried out. He admits also that he, as representing Her Majesty's Colonial Government, refuses to perform the said contract for the reason that it is undesirable in the public interests that the said contract should be carried out; also that he refuses to pay the sum of £50,000 by way of damages.

He denies that the plaintiff is entitled to call upon the defendant in this action to carry out the said contract, and he denies that the plaintiff has sustained damages by reason of the premises in the sum of £50,000. He asks leave to refer this honourable Court to such proof of damage, if any, as the plaintiff may adduce, and he prays that the Court may award the amount of such damages according to law.

The plaintiff excepted to this plea, and on the 18th March last the exceptions were overruled.*

The case now came on for hearing.

Mr. Solomon, Q.C., and Mr. Searle appeared for the plaintiff, and Mr. Maasdorp, Q.C., S.G., Mr. Giddy and Mr. Webber appeared for the Government.

A schedule prepared by his accountants was put in by the plaintiff giving particulars of the different railway refreshments contracts at present existing and showing estimated loss of profits owing to cancellation of the contract (not including option of renewal five years) £106,574 13s. 4d., and (including option of renewal five years) £158,227 9s. 2d. The evidence of the plaintiff went to show that his present profits amounted to between £6,000 and £7,000 a year, and that he valued the contract, which had been cancelled, at considerably more than £50,000.

The lessees of several of the refreshment-rooms at different stations were called for the plaintiff. The majority of these witnesses proved that they were making a profit of 20 per cent., but there was evidence that some of the refreshment-rooms would not pay if they had not been carried on in conjunction with other business.

Mr. Solomon, Q.C., was heard on behalf of the plaintiff. He contended that specific performance could be granted, but if the Court were against him on that point then very substantial damages should be awarded, the measure being the loss of profits which the plaintiff had sustained.

* *Vide* declaration *ante* page 108.

* *Ante* page 108.

Counsel cited the following authorities in argument: *Masterton v. Mayor of Brooklyn* (7 Hill, 62) (discussed in *Mayne on Damages*) 2nd Ed., p. 28, 3rd Ed., p. 44); *Frost v. Knight* (L.R. 7, Ex. p. 111); *Wilson v. Northampton Banbury Junction Railway Company* (9 Ch. App., 279); *Greene v. West Cheshire Railway Company* (L.R. 18, Eq. 44); *Ryan v. Mutual T.W.C. Association* (L.R., 1893, 1 Ch Div., 116), Act 87 of 1888, section 1.

The Solicitor-General contended: (1) That the Court could not decree specific performance as the defendant represented the Sovereign and because the Court could not enforce its judgment. He cited* *Palmer v. Hutchinson* (L.R. 6, App. Cas., 619); *Fraser v. Siverwright* (8 Juta, 55), and compared 28 & 24 Vic., cap. 84, with Act 87 of 1888. He also referred to the Charter of Justice, section 30; *Capitulation Treaty* (1806), section 8 and *Cession of the Cape*, (1814), section 8; *Fry on Specific Performance*, pp. 287, 246. *Clark v. Lord Rivers* (L.R. 5, Eq., 91); *Wright v. Williams* (8 Juta, 168); *Van der Byl v. Hanbury* (2 Juta, 80); *Lippert v. Amies* (1 Juta, 187), and *Farnell v. Borman* (L.R. 12, App. Cas., 648) (2). On the question of damages he contended that the Natal extension and the line from Delagoa Bay to the Transvaal would seriously interfere with passenger traffic on the Cape lines, and this was a factor in the case which the Court must consider. Again it was still open to the plaintiff to tender for the most profitable refreshment-rooms. Moderate damages would be ample compensation.

Mr. Solomon in reply.

The Chief Justice said: But for the fact that a very large amount is claimed in this case, I should be inclined to say that it is a very simple case indeed. It is quite clear that there has been a contract between the plaintiff and the Government, and that that contract has been broken by the Government. The plaintiff is therefore entitled to a remedy. What that remedy is to be depends upon the circumstances of the case. Even the law authorising the Court to grant what has been called in this case a decree of specific performance against the Government is not applicable, because I don't think this is a case in which specific performance ought to be granted. It is unnecessary to go fully into the law relating to specific performance. There are certainly cases in which the Court has the power to give judgment against individuals although these individuals purport to act under the authority of the Crown. When an individual does any wrong to another, the mere fact that he acts under the authority of the Crown is no

defence; but it is quite in the power of the Court to prohibit that damage, by granting an interdict to restrain the individual from doing the wrong, and if that wrong is continued it is quite in the power of the Court to punish the person who commits the wrong for contempt of court. It would make no difference in such a case whether the person who so committed the wrong purports to act under the authority of the Crown. With regard to the question arising out of the contract, difficulties may arise no doubt, and for the present, under the Act of 1888, the power of the Court is somewhat limited. We are not justified in granting more than a judgment for damages, and in this case I am of opinion that damages would be a sufficient compensation for any injury which the plaintiff has sustained by reason of the breach of contract by the Government, and the only question is what is the amount of the damages which should be awarded to the plaintiff for the defendant's breach of contract. There are two circumstances which bear greatly with me in the consideration of this point, as being strongly in favour of the plaintiff, and these circumstances are, first of all, that the defendant himself justifies, not legally, but to his own conscience, the breach of contract on the ground that it was for the public interest that the contract should be broken. By this, I understand that the public would be losers by the fulfilment of the contract as it stands, and, in proportion, as the public would be the losers the plaintiff would be the gainer. This very justification would go far to increase the damages to which the plaintiff would be entitled. There is another fact in the case which points first of all in favour of heavy damages in favour of plaintiff, and that is that under the contract he has the monopoly of supplying or keeping all the refreshment-rooms over all the lines of railway in this colony or elsewhere belonging to and under the control of the Colonial Government. A monopoly like that might under ordinary circumstances be a very valuable monopoly. That, I say, is a very strong circumstance in favour of the plaintiff. There is a third circumstance which weighs with me in favour of the plaintiff, and that is there has been of late undoubtedly, according to the evidence, an increase in passenger traffic on the different lines of railway, and in proportion as that traffic increases, any person having the contract for keeping all the refreshment-rooms on the Colonial railways would make a larger profit. On the other hand, in estimating the damages which we ought now to award to the plaintiff, there are many considerations which must induce us not to give too heavy damages in this case. There is one clause in the contract which, I think, would go very far in very materially reducing the profits which the plaintiff would be

* See also *Attorney-General, Straits Settlement v. Wemyss* 13 App. Cas., 192; *Hettigswage Siman Appu. and Ors v. The Queen's Advocate* (9 App. Cas., 571). Rep.

able to make out of his contract, and that is the clause which binds the plaintiff to maintain all refreshment-rooms as they now exist, and any that may afterwards be opened. Clause 7 reads: "The contractor shall not have the right to close any refreshment-room, but shall be bound during the existence of this agreement to continue to supply refreshments at all existing refreshment-rooms, or at such as may hereafter be opened, unless authorised by the Colonial Government to close the same." I understand from this clause that it is the Government which may open refreshment-rooms. The Government under this contract has the power to open refreshment-rooms at every little railway-station in the country, and the plaintiff would be bound to keep open these refreshment-rooms. That might entail a very serious loss indeed upon him. He would be obliged to engage a manager at every one of them. Under the circumstances hitherto existing, such persons as wives of the station-masters, or persons who have stores at or near the stations have been keeping these smaller refreshment-rooms, and carrying them on, some say, at a profit, although it is not clear what the profit is, and they say that but for the fact that they have all a store or some other business in connection with the refreshment-rooms, they would have made no profit whatever. So I am quite satisfied that the plaintiff, under the contract, would have experienced a very heavy loss at a great many of the refreshment-rooms in this colony. He would have required trustworthy managers at all of them, and these managers would require fair salaries. I cannot see how plaintiff could pay these fair salaries to managers at all these little refreshment-rooms and make a profit. There would be a loss of money. Then again, there is another circumstance which, I think, ought not to be lost sight of. The plaintiff is still a young active man who understands his business perfectly, as he himself would be the first to admit. Under this contract he would be bound down to it. It will be quite open for him to tender again to carry on the same refreshment-rooms which he does at present, and there is no saying that he may not again secure the contract for many of the refreshment-rooms, and be able to make ample profits. If we were to give anything like heavy damages we might be doing a very serious injustice, because he might be able to make the very same profits hereafter in respect to the loss of which we should have awarded him damages. That is a point which cannot be lost sight of. There is no reason whatever to suppose that Mr. Logan will not continue to have very important contracts in connection with the railways of this Colony. Then again there is another circumstance

which ought not to be lost sight of. It is quite true that the traffic has been increasing hitherto, but we have no certainty that the traffic will continue. Something has been said about the Oharlestown extension. Perhaps that would principally affect the goods traffic, as Mr. Logan says, but to some extent it must affect the passenger traffic on the lines of the Cape Colony. In regard to the Free State railway, under this contract the plaintiff would have the refreshment-rooms in the Free State, but if the Free State were to take over the railway the Free State would not be bound, so far as I can judge from the Convention, to take over any contracts which the Colonial Government has made with contractors. There is no clause in the Convention to lead me to suppose that many of these very profitable refreshment-rooms in the Free State might not under such circumstances be lost. Then there is another circumstance. If we give judgment in favour of the plaintiff, it would be for a round sum. The capital sum that would be awarded to him would enable him, active as he is, to extend his business and he would have this advantage, that out of this sum he could make considerable profits hereafter. Therefore, bearing all these different circumstances in mind, looking at the case from every point of view, and considering the great risks which lie upon a contractor who undertakes a business of this nature, looking at the case in all its bearings, we have come to the conclusion that £5,000 would be sufficient compensation for the breach of this contract. Judgment will therefore be for £5,000 with all costs.

Mr. Justice Buchanan concurred. Practically, he said, the Court had no law to decide in this case. It was unnecessary, after the view the Court had taken of the contract, to decide whether or not the Act of Parliament empowered the Court to give any other judgment than one of damages. It might be well argued that the Act intended to place Her Majesty's Government in the Colony in exactly the same position as a private individual. When the Queen submitted a case to the judgment of the Court it was equivalent to the command "Let justice be done," and when it was done her servants would see that the decree was carried out. But this was not a case even in which as against a private individual specific performance would be decreed. The Court ought to view the case much as they would look at that of a private railway company entering upon a similar contract and then suddenly breaking it. His lordship did not think that any railway company would be allowed to play fast and loose with a contract of this nature, and no more would a Government be allowed to break a contract in this manner even if it were in the public interest. A Government should especially keep faith with its contractors. He

agreed with the judgment of the Chief Justice.

Mr. Justice Upington was of the same opinion, and he confessed that his mind was largely influenced by what he characterised as the fatal admission of defendant in pleading that the contract was cancelled in the public interest.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buismans; Defendant's Attorneys, Messrs. J. H. Reid & Nephew.]

STEYN V. STEYN'S TRUSTEE. { 1898.
May 30th

Insolvency—Property in possession of insolvent—Act 6 of 1843, section 76.

In the absence of satisfactory proof that property found in the possession of an insolvent belonged to his son the Court refused to grant an order restraining the trustee from selling the same.

Mr. Graham moved for an order restraining the respondent from selling a certain racehorse called "Champion," alleged to be the property of the applicant's son.

The facts are as follows:

The applicant's estate was placed under sequestration in January last and the respondent (who is the Deputy Sheriff for Albert) was appointed sole trustee. On the 22nd March the respondent entered the premises of the applicant's wife (married without community of goods) and attempted to seize and remove a certain racehorse called "Champion" standing in the stable of the said premises, the horse being, as applicant alleged, the *bonafide* property of his son. Thereafter on the same day the respondent having received notice from the applicant's son that the horse was his lawful property made an affidavit before the Resident Magistrate for Albert, in which he alleged that the horse was the property of the applicant's estate and that the applicant was concealing the same. Thereupon a warrant was granted under Act 6 of 1843, section 76, under which the respondent attached "Champion," and under a similar warrant attached a certain mare and foal alleged also to belong to the applicant's son. The applicant's son through his attorney gave notice to the respondent not to part with the said horses pending an action which he intended to institute against him (the respondent) for recovery of the said horses. There was no affidavit from the alleged owner of the horses, a circumstance which was explained in his attorney's affidavit by the fact of his being absent from the district and owing to the impossibility of communicating with him. The respondent recently

notified in the "Burghersdorp Gazette" his intention of selling the horses by public auction on the 31st May, hence the present application.

In the absence of an affidavit from the alleged owner of the horses the Court refused to grant an order.

[Applicant's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

BLAKE V DE VRIES. { 1898.
June 1st.

Mr. Sheil moved for provisional sentence on a promissory note for £21 8s. 4d., with interest from the due date.

Granted.

BLAKE V. NEL.

Mr. Juta moved for provisional sentence on a promissory note for £19 2s. 1d.

Granted.

BLAKE V. UYS.

Mr. Juta moved for provisional sentence for £7 5s.

Granted.

NEL V. LA GRANGE.

Mr. Sheil moved for provisional sentence for £10, less £9 paid on account, with interest from 15th October, 1892.

Granted.

THE MASTER V. BARNARD'S EXECUTOR AND CAREY'S EXECUTRIX.

Mr. Giddy, on behalf of the Master, asked for an order of Court calling upon defendants to furnish accounts.

The Court made the usual order, the accounts to be filed within a month.

ANGLO-AFRICAN COMPANY V. LOWDEN.

Mr. Rubie moved for provisional sentence on a mortgage bond for £1,017 9s., with interest of £952 10s. 8d. from 1st May, 1898.

Granted.

FLETCHER V. AMELER.

Mr. Watermeyer moved for judgment in default of appearance for £89 12s. 8d., less £5 paid to account. There were two sums, £1 8s. 8d. and 6s. 6d. respectively, belonging to defendant at present in the hands of the sheriff, which counsel asked should be made executable.

Granted.

POWRIE V. TRUSTEES OF KIMBERLEY EXHIBITION.

Mr. Tredgold moved for provisional sentence for £7 12s., balance of account.

Granted.

HALL V. WATKINSON'S TRUSTEE.

Mr. Buchanan moved for an order compelling defendant, as trustee in the insolvent estate of Henry Watkinson, to give a full, true, and proper account of the estate, supported by vouchers.

Granted.

WALKER V. DU PREZ.

Mr. Graham moved for judgment for £10 6s. 2d., less £5 paid on account.

Granted.

VAN NOORDEN V. WIID.

Mr. Molteno asked that in this case the provisional order might be discharged.

Granted.

MACDONALD, VARDY AND CO. V. MACDONALD

Mr. Jones moved for provisional sentence for £4,062, with interest from 1st January, 1898.

The case had not been put on the roll, and the Court granted provisional sentence subject to the case being set down in the usual way and the fees paid.

**WILLOUGHBY V. WILLOUGHBY. { 1898.
June 1st.**

Malicious desertion—Restitution of conjugal rights—Claim in reconvention—Judicial separation—Cruelty.

In an action for restitution of conjugal rights, failing which, for divorce on the grounds of malicious desertion, the defendant admitted the desertion, alleged cruelty (which was fully proved) on the part of the plaintiff, and claimed in reconvention a decree of judicial separation.

The Court granted a decree of judicial separation.

This was an action for restitution of conjugal rights failing which for divorce, instituted by

Robert Willoughby, residing on a farm near Wynberg, against his wife Caroline Willoughby, now residing at Mouille Point.

Mr. Watermeyer for plaintiff; Mr. Searle for defendant.

Defendant filed a plea admitting the desertion, alleging cruelty on the part of plaintiff, and claiming in reconvention a judicial separation and division of the joint estate. The onus being on the defendant, she was called first.

Caroline Willoughby, defendant, deposed: I am the wife of plaintiff, and was married to him on 8rd December, 1879. There were four children born to plaintiff before the marriage, and he has since acknowledged them as his own. We have never lived happily. He has been greatly addicted to drink. When under the influence of liquor he uses very bad language and ill-treats me. On one occasion he dragged me by the hair, threatened to put me on the fire, and stood with a drawn sword over my head. He has systematically ill-treated my children. My sons have supported me. They have given me money, but plaintiff has not. I have had him before the Magistrate's Court for his conduct. I have had to leave him on various occasions. I am not willing to go back to him. I am in service, and I am very happy. I know that he has money. At Christmas he took £10 out of the Post-office Savings Bank, and he told me he had then £145 to his credit.

Cross-examined by Mr. Watermeyer: I lived with my husband eleven years before I married him. He was renting a bit of ground from Mr. Versveld. I was a servant on the farm. Some time before the marriage I took £10 from a money-box belonging to plaintiff. I left him finally in January of this present year. I subsequently received a letter from plaintiff's attorney, asking me to return. I did not return.

Charles Willoughby (17) deposed that he was living with his mother at Mouille Point. He had seen his father ill-treat his mother on many occasions. It was generally when he was drunk that his father was violent. He had turned witness and his brothers out of the house.

Arthur Willoughby (20) deposed that for some years he had been supporting himself. His father had ordered him out of the house. On the occasion when his father threatened his mother with a sword, witness interfered.

Frank Willoughby (28) deposed that he had seen his father strike, kick, and knock his mother about many times.

Dr. Wright, Wynberg, deposed that he had professionally visited plaintiff four or five years ago, when he found him suffering from a chronic state of intemperance.

This closed defendant's case.

Robert Willoughby, plaintiff, deposed: I came

out to the Colony in 1850. I was then married. My wife died seven years afterwards. I am now sixty-six years of age. Sixteen years ago I had an accident with a pistol, and shot off the second finger of my left hand. I rent a small patch of land from Mrs. Versveld, whereon I grow vegetables. I took up with defendant six years after my wife's death, and I married her on the 8th December, 1879. I never assaulted her except on one occasion, when she was abusing my first wife. I never threatened her with a naked sword. I have a sword, which I use for pruning the hedges, but not for assaulting my wife. I have slapped my sons occasionally for being disobedient. My wife left me in 1887, and took away £18 10s. in gold out of my box. I never turned out my sons. I have a cart which takes my vegetables into town, which cart used to bring back provisions.

Cross-examined: I can drink a bottle of wine a day. I don't go in for brandy—that's only good for Kafirs. I have whipped my son Charles for disobedience. I never struck him on the face with the buckle of a soldier's belt. I never used my sword against my wife. My bank-book shows a balance of £50. I have to pay men for labour on my land since my sons left me.

Mr. Francis F. Versveld deposed that plaintiff rented a small piece of land from him on the farm of Klansenbosch. He did not think he could make much out of it. Witness had never seen him under the influence of drink. His boys were very disobedient.

The Court, counsel consenting, granted a decree of separation *a mensa et thora*, and ordered the plaintiff to pay to the defendant the sum of £25 in full satisfaction of her costs, and all claims she might have on his estate by virtue of her marriage in community of goods.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arden; Defendant's Attorney, D. Tennant, jun.]

BUISKE V. BUISKE. { 1898.
June 1st.

This was an action for divorce by reason of the defendant's adultery.

Harry Buiske, plaintiff, examined by Mr. Searle, deposed: I was married to defendant in November, 1875, at Hanley, Staffordshire. I am a Pole, and could at the time of my marriage write Hebrew, but not English. We lived seven years together at Hanley, and had five children. I came to South Africa in 1882 to better myself. I made remittances to my wife for four years, varying from £5 to £7. My wife wrote to me asking me to come home in 1886. I offered to go, and she wrote to me not to come, as times were bad. I afterwards heard she was living with another

man, and in consequence I brought my children out in 1888. My mother came with them.

Isaac Buiske, son of the plaintiff, deposed that he was taken by his mother to Birmingham. His mother took a man, called Roberts, in as a lodger. They lived together as man and wife. Witness told Roberts he would report the matter to his father. Roberts kicked witness so badly that he was laid up in the hospital for a year.

A decree of divorce was pronounced, subject to the production of the marriage certificate, a copy being only before the Court.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

REHABILITATIONS.

On the motion from the Bar, the following insolvents were granted their rehabilitations: Louis Christian J. P. Karsten, Frederik Wilhelm M. O. Capelle, and Johannes P. van der Westhuisen.

GENERAL MOTIONS.

PETITION OF JOHN SLATER.

Mr. Rubie moved to make absolute the rule *nisi* for registration in the name of petitioner of the title to a certain lot of ground marked No. 55, situated in Steynsburg, at present registered in the name of Daniel Jacobus Robbertse.

Granted.

PERFECT V. PERFECT.

Mr. Graham asked the Court to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against his wife for divorce by reason of her alleged adultery, and for the custody of the children of the marriage.

The Court made the order and appointed Mr. Graham counsel.

Ex parte PINN (in his capacity as { 1898.
Town Clerk of the Municipality { June 1st.
of Port Elizabeth).

Derelict lands—Act 28 of 1881—Attachment
—Sale—Inquiry—Agent — Remuneration
—Taxation.

The Court refused to direct the Taxing Officer to tax a reasonable remuneration proposed to be paid out of the proceeds of the sale of derelict lands by a Municipality to an agent who had been employed by the Municipality for the special purpose of instituting an exhaustive inquiry as to the exact amount of rates payable in respect of each lot attached.

Mr. Juta presented the petition of William

Pittman Pinn in his capacity as the Town Clerk of the Municipality of Port Elizabeth.

It appeared from the petition that during the years 1891 and 1892 the Court directed that a large number of lots of land, upwards of 180, situate in the Municipality of Port Elizabeth, should be attached as derelict, and sold to satisfy the rates due in respect thereof. Before any proceedings could be instituted an exhaustive inquiry had to be made as to the exact amount payable in respect of each of the lots ordered to be attached. This inquiry was conducted by an agent at Port Elizabeth and his assistants, and occupied between two and three months. The agent was entrusted with this work because of its technical character and because of his extensive acquaintance with the properties involved and knowledge of the names of the various parties who from time to time owned or occupied the same, and because it was absolutely necessary that the work should be given to a person possessing the necessary technical experience, the bulk of the matter to be ascertained being purely technical, such as the Municipality's own officers could not (as it was alleged) be expected to supply. The inquiry, which was instituted with the object aforesaid, involved the going through the Council's valuation and assessment rolls for the period since 1887, that is to say the collecting from eight valuation rolls and 168 assessment rolls of the information necessary to enable the requisite instructions to be given for the preparation of the petitions. The fact that several of the officials and others who had made or kept sundry of the said rolls were dead, rendered the searching thereof and the obtaining of reliable information therefrom the more difficult. Detail accounts had to be framed in each instance of the matter traced in order to enable the Council to state in its instructions the fullest information possible, all of which was framed by the agent. The lots were sold in April last and realised about £1,100, the total of the rates claimed amounted to £160 or thereabouts. It was alleged that if the agent had been employed to recover arrear rates in the ordinary course he would have been allowed a commission of 15 per cent. on the amount recovered, or £22 10s. on the total of £150. The petitioner respectfully submitted that the said percentage did not constitute a fair remuneration to the agent for the special labour aforesaid incurred under the special circumstances, wholly attributable to the neglect of the owners of the lots attached, who had omitted to from time to time notify change of address or ownership. Application had been made to the taxing officer to tax an allowance to the agent in respect of his special labour, which allowance might be brought up as part of the costs to be allowed to the Municipality. The taxing officer, while satisfied

that the labour had been incurred, was yet of opinion that he could not tax the agent's proposed allowance for the following reasons:

1. Because the agent was not an attorney of the Supreme Court, and

2. Because in his (the taxing officer's) view the said labour did not form a charge against the proceeds of the sale but ought to be a charge against the Municipality.

The petitioner submitted that it would not be fair to charge the Council with such an allowance inasmuch as the causes of incurring the said expense were the neglect and omission of the owners of the lots attached. Under the special circumstances of the case the petitioner further respectfully submitted that a reasonable allowance to the agent in respect of his trouble and labour should be ordered to be paid out of the proceeds, as otherwise the result would be that the Council, which had undertaken all the labour aforesaid, would lose, while the representatives of the respective owners would reap the benefit of labour incurred as a result of their own negligence. And that a further element to be considered was the fact that the Council had incurred considerable expense in connection with the petitions which, although fairly incurred in connection therewith, had yet been disallowed by the taxing officer, or formed a charge not capable of being debited to the proceeds of the sale of the said lots. The petitioner prayed the Court to be pleased to award a fair allowance to the said agent for his labour, and to remit the matter to the taxing officer with directions to tax a reasonable remuneration for the said agent in respect of his labour, and to direct that the same should form a charge against the proceeds of the sale of the lots attached.

Mr. Juta was heard in support of the petition and dwelt upon the evident injustice which would be done to the Council if they had to pay expenses which had been occasioned by the negligence of the owners of the lots. All that was asked for was a fair and reasonable remuneration for work which was admittedly necessary. If the application were not granted the only persons who would benefit would be the heirs or representatives of the negligent parties.

The Court refused the application.

The Chief Justice said: With due diligence on the part of the Town Council or Divisional Council there ought to be no difficulty in knowing from time to time any changes of ownership that might take place, nor ought there to be any arrears of rates. No Council or Municipality ought to allow arrears, and if there were arrears the ratepayers should be sued, but the Council ought not to allow fifteen or twenty years to elapse, and allow land to become derelict. Under the Act facilities were given for

the sale of derelict land, but the Act did not authorise the Court to give a Council or Municipality, as the case might be, the right to recover all costs which they had to incur for the purpose of ascertaining title. It would therefore be a dangerous precedent in the present case to grant the order prayed for. The general principle was that the Court did not allow an agent his costs—at least, did not allow the taxing officer to tax them without an order, where the proceedings were brought for the purpose of qualifying a witness to give evidence. They were not as a general rule allowed unless there were special circumstances. There were certainly no special circumstances in this case which would justify the Court in allowing the special costs incurred by the agent. A strong argument was urged that the heirs of the defaulting ratepayers would be entitled to the full benefit of any surplus which there might be after payment of the rates. There was something in that argument, but on the other hand the Court always protected the interests of absent persons, and here those people who were absent must be protected as well as the Town Council. The application would be refused.

Their lordships concurred.

[Applicant's Attorney, G. Montgomery Walker.

BENNETT V. MORRIS. { 1898
June 1st.

Plea—Extension of time within which to file.

Where a defendant in an action for slander had entered appearance, and six weeks afterwards had left the Colony for a few months for the benefit of his health, the declaration not having been filed until after his departure, and the defendant being under the impression that the plaintiff had abandoned the action, the Court, under the special circumstances of the case, granted an extension of time within which to file the plea.

This was an application upon notice calling upon the respondent (the plaintiff in the action) to show cause why applicant should not be allowed time to file his plea until his return from England.

The facts are briefly these :

The summons (claiming £500 for slander) was issued on 15th February, 1898, and served on the same day.

Appearance was entered on the 21st February and notice thereof served on the plaintiff's attorneys on the same day.

Defendant heard nothing more about the matter, and on the 27th March following being in ill

health, and under the impression that the plaintiff had abandoned his action, he went on a sea voyage intending to be absent until the end of the following July.

The declaration was filed and copy served on the defendant's attorney on the 5th May.

On receipt of the declaration the defendant's attorney wrote to the plaintiff's attorneys informing them that his client had gone on a trip in a trading vessel under the impression that the plaintiff was not going to proceed further with his action, and asking them to give him time to plead till after his (defendant's) return to the Colony, failing which application would be made to the Court.

To this letter the plaintiff's attorneys replied that they were instructed by their client to refuse an extension of time within which to plead—inasmuch as the defendant had ample time within which to instruct his attorney as to his acts in connection with the matter at issue, and further, that their client had reason to believe that the absence of the defendant was intentional.

The defendant's wife denied on affidavit that her husband's absence was intentional, and alleged that he would return to the Colony about the end of July or the middle of August.

The defendant's attorney stated in his affidavit that it would be impossible for him to instruct counsel to draft the plea during the defendant's absence, as he was unaware of the nature of the defence which the defendant intended to set up.

The plaintiff's attorneys in their answering affidavit alleged that the plaintiff would agree to a reasonable extension of time if the defendant's attorney could give an assurance that the plea would be filed within a reasonable time.

Mr. Graham was heard in support of the application and asked for an extension of time until August next, in which month it was expected that the defendant would return to the Colony.

Mr. Webber, for the respondent, consented on condition that the applicant paid the costs of the present application. He cited *Stewart v Kingon* (1 C.T.L.R., 101).

The Court extended the time within which to file the plea until August next, and ordered costs to be costs in the cause, as the circumstances in the present case differed materially from those in *Stewart v Kingon*.

[Applicant's Attorney, J. Hamilton-Walker. Respondent's Attorneys Messrs. C. and J. Buissinne.]

PETITION OF JOHANNES M. LE ROUX AND ANOTHER. { 1898.
June 1st.

Mr. Molteno asked the Court to make absolute the rule nisi for transfer to petitioners of certain one-sixth share in lot C of the sub-

divided perpetual quitrent farm De Kango, in the district of Oudtshoorn, and also of the one-sixth share in the remaining extent of the said, farm.

Granted.

LOTTER V. BRUNSDON.

Mr. Innes, Q.C., on behalf of appellant, moved for an extension of time till the 1st August next for the hearing of the appeal in the suit between the parties from the judgment of the Eastern Districts Court.

Granted.

IN THE ESTATE OF THE LATE WILHELM F. RISSING.

Mr. Watermeyer applied for an order relieving the executor dative and tutor dative, William Hay, of his office, the estate having been practically liquidated, and the portions of the minor children having been paid into the Guardians' Fund.

Granted.

IN THE ESTATE OF THE LATE THOMAS H. VENN.

Mr. Watermeyer, on behalf of the petitioner, Lucy Anne Venn, moved for authority to the Master to pay out to the widow of the said Venn, from the amounts paid into the Guardians' Fund to the credit of the minor children, a sum of money to enable her to discharge certain debts and to provide for the future maintenance and education of the said minors.

Granted.

GRAHAM V. GRAHAM.

Mr. Graham asked the Court to make absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce. Publication had already been effected in the "Daily Telegraph," and counsel now asked that the return day be further extended to 1st August next.

DIXON V. DIXON.

Mr. Graham, on behalf of petitioner, John F. Dixon, moved for leave to sue by edictal citation in an action against his wife for restitution of conjugal rights, failing which for divorce, and custody of minor children of the marriage. The Court ordered personal service, and fixed the return day for 15th August.

WASSERFALL V. WASSERFALL.

Mr. Shell moved for extension of the return day of the edictal citation issued by applicant in the proceedings instituted against her husband for

divorce, and for further directions as to service. The Court ordered one publication in the "Hampshire Advertiser," and extended the return day to last day of next term.

IN THE ESTATE OF THE LATE JAMES COUTTS.

Mr. Moltano asked for leave to the executors testamentary to sell certain lands situated in the district of East London, the property of the estate, the same being unproductive, and to employ the proceeds in improving the house property in the town of East London; and also to effect an exchange of an undivided share in two erven for one of the erven in question.

Granted.

Ex parte TRUSTEES DIOCESE OF { 1898.
CAPE TOWN. { June 1st.

Lost Bond — Cancellation — Deeds' Office Regulations 35—42—Non-compliance with.

Mr. Juta moved for authority to the Registrar of Deeds to cancel a certain mortgage bond for £1,800, passed by Hermannus J. Engelbrecht on the 20th October, 1888, hypothecating a certain farm known as Vlaktefontein, in the district of Albert, the original bond having been lost or mislaid, and it being now necessary to pass transfer of the said farm to the purchaser thereof.

In 1885 Engelbrecht assigned his estate for the benefit of his creditors, and Mr. H. O. Flemmmer was appointed assignee.

The farm Vlaktefontein has now been sold to one S. A. Lategan for the sum of £1,450, but transfer cannot be passed to the purchaser unless the bond due to petitioners be cancelled.

The purchaser has demanded transfer, and threatened legal proceedings unless the same be passed to him forthwith.

The petitioners applied to the Registrar of the Diocese, who had the custody of the original mortgage bond at the time when Engelbrecht assigned his estate; for the bond, but have been informed that he forwarded it to Mr. G. Sichel, then practising as a general agent at Burgersdorp, now of Cape Town, to prove petitioners' claim in the aforesaid estate.

The claim was proved, and awards have from time to time been made thereon by the assignee, who stated on affidavit that he was never in possession of the bond.

The petitioners alleged that the bond had not been ceded or pledged, but was still their property, and that they had applied to Sichel for the bond, and were informed that he was unable to trace it, and that it must either have been lost or mislaid and that he had made diligent search for it, but could not find it.

The petitioners prayed for an order directing the Registrar of Deeds to cancel the said mortgage bond to enable the purchaser of the property to obtain transfer upon payment of the purchase price. The matter was submitted to the Registrar of Deeds, and he reported that rules 86 *et seq.* of the Deeds Office had not been complied with, and that he informed the parties that when they brought the necessary declarations required by rule 86 he would deal with the matter, but was told, in reply, that the month's notice required by rule 42 would be too long for their purpose, and that a special application to the Court would therefore be made.

The Chief Justice said if the Court were to make an exception in this case it would be the exception which would establish the rule, and he did not think that the special circumstances of this case were sufficient to justify the Court in granting it. If there had been negligence somewhere, it was better that that negligence should be brought home in some way or another to the negligent person. The application would be refused.

[Applicant's Attorney, A. S. Sinclair.]

DRAKE V. DRAKE. { 1898.
 { June 1st.

Mr. Searle moved for an extension of the return day of the citation in the proceedings instituted by applicant against his wife for divorce by reason of her alleged adultery, and for further directions as to service of the process.

The Court ordered one public notice in the "Government Gazette" and one in the Johannesburg "Star" failing personal service.

PETITION OF WILHELM PERKINS.

Mr. Cantens asked the Court to make absolute the rule nisi for transfer to petitioner of certain lot of ground marked 18, block K, in King William's Town, purchased by petitioner from Thomas Howells in 1872, but at present registered in the name of Peter Wouter Scholtz.

Granted.

SAMUELS V SAMUELS.

Mr. Graham asked the Court to make absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

The Court extended the return day till 12th June.

TRUSTEES OF ASBESTOS CO. V. KING AND OTHERS.

Mr. Searle, on behalf of the trustees of the Asbestos Company, said in view of what their lordships had stated at the conclusion of the case when it came up on appeal from the High Court, they (the trustees) had decided to abandon their cross appeal to the Privy Council, and had agreed in that respect to abide by the judgment of the Supreme Court. They would give due notice of this to the Registrar, and he (counsel) had been instructed to mention the matter to their lordships.

REGINA V. WALTER BENSON AND WILHELM BRUTT.

Mr. Juta mentioned these two appeals from convictions on a charge of contravening the provisions of the Seab Act of 1886. The circumstances, he said, were the same as in the case of *Regina v. Theron* (ante p. 166) which their lordships had decided a few days ago, and in which they quashed the conviction. He now asked that the conviction in both cases be set aside.

Mr. Giddy, for the Crown, said in view of the decision of their lordships in the case "*Regina v. Theron*" he could not support the convictions.

The Court accordingly ordered the convictions to be quashed.

CADLEY V. CADLEY.

On the motion of Mr. Graham, the return day in this action was extended till 1st August.

WIESE V. MOSTERT.

On the motion of Searle, to which Mr. Juta consented, Mr. Currey was appointed commissioner to take the evidence of a witness who is leaving shortly for Namaqualand.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

AARON V. EXCELSIOR BENEFIT SOCIETY. { 1898.
June 2nd.

Benefit Society—Sick pay—Negligence.

The plaintiff having been disabled by sickness from doing work for twelve days claimed sick pay from the defendant society to which all fees due by him as member had been duly paid.

The sickness was caused by an assault committed upon him for which he had given some provocation.

Held, that the mere fact of his having given such provocation did not debar him from recovering his sick pay.

This was an appeal from a decision of the Acting Resident Magistrate for Cape Town in an action in which the present appellant (plaintiff in the lower Court) sued the defendants, the trustees for the time being of the Excelsior Benefit Society No. 2, Cape Town, for the sum of £1 10s. sick pay, to which he alleged that he was entitled.

The summons set forth :

1. That the plaintiff was a member of the society, and that the defendants were the trustees of the society, and the proper persons to represent the said society in this action.

2. That the plaintiff, in or about the year 1884, duly paid his admission fee, and was admitted a member of the said society, and has since that time paid and continued to pay all amounts due and payable by him under the rules and regulations of the said society.

3. That on or about the 27th day of March, 1898, the said plaintiff, by reason of sickness arising from certain injuries and hurts sustained by him, was incapacitated from attending to and performing his daily labours for a period of twelve days, as from the 27th day of March, 1898, to the 8th day of April, 1898, inclusive.

4. That by reason of such sickness he was entitled to receive from the said society the sum of 2s. 6d. per diem under and by virtue of rule 21 of the said society, exclusive of Sunday, the 2nd April, 1898.

5. Wherefore the plaintiff claimed payment of

the aforesaid sick pay, amounting to the sum of £1 10s., being for twelve days, at the rate of 2s. 6d. per diem, and costs of suit.

The defendants pleaded :

1. The general issue, and specially

2. That the plaintiff was not entitled to any relief or sick pay from the defendant society, upon the ground that his illness or incapacity was brought on by his own wilful and wanton act in fighting with a man at the Alfred Docks, Cape Town.

The Magistrate dismissed the case with costs.

The material part of Rule XXI., section 1, is as follows :

The amount of benefits to which each member in full compliance with the society shall be entitled to is : All male members 2s 6d. per day (Sundays excepted) for the first six months, and shall be reduced to one-half for the next six months.

Section 2.—*Should any member's illness continue for any further period, the committee shall determine the amount to be paid to the member during the remainder of his or her illness, provided always that the illness of the member has not been occasioned by immoral conduct—a doctor's certificate being produced in each case before any sick allowance is granted.*

Rule XXVII., section 4, provides :

Any member whom the law shall convict of any criminal offence, inferring infamy and moral depravity, shall be excluded from this society, and shall cease to be a member thereof.

The following evidence was given at the trial :

David Aaron (plaintiff), sworn, states : I am plaintiff. I am a member of the Excelsior Benefit Society since the lodge was started. Since 1884 I paid £2 2s. a year—in all over £18. On 24th March last I was at the Docks, a man Chapman spoke to me about the theft of something. I said to him that if he says a thing of that sort and can't prove it that he'll go to the Breakwater. He then gave me two blows and he kicked me three times and hit me. I did not strike him. Several people were present. I was laid up in consequence of the assault for twelve days. Three doctors attended me. I claim by Rule XXI., section 2 of the society, twelve days at 2s. 6d. per day and they (the trustees) refused to pay. Chapman is away and I took action against him by lodging a complaint at the Police-station.

Cross-examined : I did not attend the Arbitration Committee. I said nothing. I did follow Chapman about, but did not threaten him and I did not touch him. I have not been fighting in town, and never before except I've been in war I never provoked Chapman. I was not in a canteen on that night. I was laid up on the 26th March. Chapman assaulted me on the 24th

March. No complaint was lodged against me. I suffered pain.

Dr. John Petersen, sworn, states: I attended plaintiff at about the date stated by him. He suffered from injuries from blows. The chief injury was in the groin. Rupture might have been caused by a kick. The injury would have kept him in bed four or five or six days. He also suffered from old complaints which kept him longer.

Cross-examined: The injuries are not serious, and they might be caused by struggling with a man. There were marks on his face.

George Witch sworn states: I am a boatman. I remember an assault in March last. Plaintiff asked Chapman his name and I passed on. I looked round and saw Aaron running and Chapman after him. Chapman punched and kicked plaintiff as much as he liked. Plaintiff did nothing that I saw. A police-constable then came up and Chapman ran away. I then left.

Cross-examined: Plaintiff asked Chapman his name. I did not see what happened before.

James Jones, sworn, states: I am one of the members of the committee and one of the trustees of the society and one of the defendants. At the meeting I was in favour of paying the man. No satisfactory evidence was adduced against it.

For the defence,

William A Jackson, sworn, states: I am a stevedore. On the 24th March I saw Aaron and Chapman at the Docks. They had a talk and Chapman left, and then plaintiff followed Chapman up and shook his finger in his face twice and then they had a fight. Both men were fighting but plaintiff got the worse and ran off. He turned round and caught Chapman by the neck, but Chapman was stronger and plaintiff got the worse. Plaintiff was on top of Chapman once and they were struggling. Chapman would not have assaulted plaintiff if he had not followed him up.

Cross-examined: I don't know who Chapman is.

I am no friend of his. I never spoke to him after the fight, nor did I see him since. I did not see any kicking by Chapman. He might have. I saw the whole fight, nor did I see him drag plaintiff.

Barnet Yearwood, sworn, states: I am a painter. On 24th March I saw plaintiff and Chapman. They were speaking. I saw plaintiff threaten him with his finger in his face three times. Chapman walked away and Aaron followed him. Plaintiff asked him his name and said he would put him on the Breakwater. They went off and I saw them fighting together. Plaintiff was on top of Chapman and struck at him. Chapman got loose and ran away.

Cross-examined: I have not seen Chapman since. I am a friend of his. Plaintiff said to Chapman "You son of a bitch, tell me your name."

I don't know who struck first. I don't know who is stronger. Plaintiff was never on the ground. I did not see him kicked. He might have been. I don't know whether Chapman had marks on him. Plaintiff provoked the fight.

The Magistrate dismissed the case with costs, the following being his reasons:

Plaintiff in this case seemed very anxious to let the Court believe that he was assaulted by the man Chapman without provocation and without returning him a blow, and on that ground, I presume, he based his claim, otherwise I think he would not have come to the Court. I find, however, that plaintiff provoked the man Chapman and that he (plaintiff) was the cause and origin of the fight in which both took part. The fight resulted in favour of Chapman, who, together with plaintiff, should have been arrested when probably this action would not have been heard of.

The plaintiff now claims benefit from the defendant society for sickness which was brought on by himself by his own illegal act, and had his claim been allowed by the Court I consider I would have been doing something tantamount to offering a premium to the commission of a crime.

Plaintiff's attorney (I believe) quoted the defendant society in the light of an Assurance Society, but plaintiff cannot recover in a case when he sets fire to his own house, or as in the present case where by his own illegal act he brings sickness on himself.

The defendant society (Rule XXIV.) provides that any member who commits suicide shall in no case receive any benefit whatsoever from the funds of the society. This supports my contention that members cannot claim as in the present case, when the plaintiff by his own wilful wanton act caused the illness complained of, but benefit is only intended for members who suffer through an act of God. I think that every member (plaintiff included) who joins a Benefit Society (as defendants' club), does so on the understanding and under an implied agreement that sick allowance could only be claimed in such cases where the member's incapacity does not arise from his own voluntary act, otherwise the object of the society would be defeated and the funds would be at the mercy of dishonest and unscrupulous members.

The plaintiff now appealed.

Mr. Rose-Innes, Q.C., was heard in support of the appeal. He referred to Rule II, as showing the objects for which the Society was founded, viz., the raising of funds by entrance fees, fines, &c., for the purpose of insuring sums of money to defray the expenses for the burial of deceased members, and for rendering assistance to members when sick and unable to follow their usual employment, and to provide medicines and medical

attendance. Sick benefits clearly include sick pay for incapacity from accident as distinguished from illness. This was clear from the general objects of the Society and from Rule XXI., section 4, in which *accident* is alluded to as a cause entitling a member to sick pay.

That being so, the only ground upon which the Magistrate dismissed the plaintiff's claim was that he had taken part in a fight which occasioned his injury. The Magistrate set up a man of straw which he proceeded forthwith to demolish. He said that the plaintiff had based his claim upon the fact that he did not strike Chapman, but that was not so. He based his claim on the fact of his being a member of the society (*vide summons*).

The Magistrate's reasons were most incoherent. It was not clear whether he relied on the conduct of the plaintiff as being wilful and wanton or upon its being criminal. His reasons pointed both ways. As to the contention that plaintiff's conduct was wilful, wanton, negligent, or imprudent—that was no defence. The very object of members in joining a society of this kind was to guard against their possible negligent and improper conduct.

Imprudence and wilful conduct are the sources of most accidents and ailments.

Again the doctrine of contributory negligence did not apply to the contracts of this nature which were on the same footing as accident insurances (May on Insurance, Vol. II., section 580).

If the society wished to guard itself against the wanton conduct of its members, as it did in the case of suicide (Rule XXIV.), criminal conduct (Rule XXVII., section 4), and immorality (Rule XXX.), it should have made rules having that object in view. (*Vide Burton v. Eyden*, L.R. 8 Q.B. 295.)

The contention, that plaintiff was guilty of criminal conduct which caused his illness, could not be sustained as the plaintiff was not convicted, on the contrary he lodged information against Chapman, who assaulted him.

It was against public policy that a man should claim any benefit from his crime. All systems of jurisprudence recognised that principle of law. But the doctrine should be carefully applied. *Vide* the judgment of Lord Esher, M.R., in *Cleaver v. Mutual Fund Life Association** (L.R., 1, Q.B.D. (1892), 147), when criminal conduct is

set up as a defence it must be proved. (*Boorman's case* not reported.)

The judgment of the Magistrate was erroneous and the appeal should be allowed.

Mr. Searle, for the respondent, referred to the preamble of the Friendly Societies Act, No. 7 of 1887 and No. 5 of 1892, as showing the object with which these societies were formed, viz., for the mutual relief and maintenance of members in case of old age and infirmity. It was never intended that sick benefits could be claimed by a member who had caused his illness by his own wrongful conduct. There was a direct conflict of evidence, but the Magistrate had found as a fact that the plaintiff had provoked the assault which occasioned his injuries and very properly dismissed the case. The principle of life or accident assurance did not apply. The appellant's injuries were the direct consequence of his own act. The maxim *volenti non fit injuria* applied, and the appellant could not claim against the Society. The finding of the Magistrate was borne out by the evidence of two independent witnesses.

The judgment should be sustained.

Mr. Rose-Innes, Q.C., was not called upon to reply.

The Chief Justice said: The plaintiff, a member of the Excelsior Benefit Society, has duly paid all the fees in consideration of which the society undertook to pay him the sum of 2s. 6d. a day in case of his becoming incapacitated, by reason of illness, from doing his daily work. He was so incapacitated for a period of twelve days' but in answer to his claim for £1 10s. the society say that his illness was brought on by his own wilful and wanton act in fighting with a man named Chapman. If he had been convicted of an offence which necessarily occasioned his illness, or if such an offence had been clearly brought home to him, it would have become necessary to consider whether the commission of such an offence debarred him from recovering his sick pay. But he has not been convicted of any offence, and the evidence does not satisfy me that if he had been prosecuted he would have been convicted. So far from being prosecuted he himself laid a charge of assault against Chapman, who could not, however, be found. The utmost that has been proved against the plaintiff is that he had given some provocation for the assault committed upon him by Chapman but the provocation was not of a criminal nature. The Magistrate, however, held that the plaintiff's sickness had been caused by his own negligence, and that inasmuch as it was not the "act of God" the plaintiff was not entitled to recover. I wholly dissent from this view. There is nothing in the regulations which could justify it, and in the absence of such a regulation, the plaintiff is entitled to recover the benefit of the stipulated contribution. If his own negligence is to deprive

* In that case it was held (Lord Esher, M.R., Fry & Lopes, L.J.), reversing the decision of a Divisional Court (Denman & Wills, J.J.), that proof that the assured (James Maybrick) had died by poison feloniously administered by his wife (Florence Maybrick), did not afford a good defence to a claim of the executors.

Aliter as regards the claim of the assignee. *Rep.*

a member of relief, there would be many cases in which the objects of the society would be entirely frustrated. A member's illness might be caused by negligent exposure to inclement weather and, if the defendants' contention is correct, he would have to suffer the consequences of his indiscretion without hope of relief from the society. The appeal must be allowed, and judgment entered for the plaintiff for the amount claimed with costs.

Their lordships concurred.

[Appellant's Attorney, C. O. Silberbauer ;
Respondents' Attorney, D. Tennant, jun.]

JORDAAN V. THE WORCESTER { 1898.
MUNICIPALITY. { June 2nd.

Damage—Contributory negligence—Statutory duty—Misfeasance—Nonfeasance—Municipality—Street.

When a legal duty is imposed upon and undertaken by a public body or individual and no other remedy is expressly provided in case of non-performance, a person who, without contributory negligence, sustains damage by reason of such non-performance, is entitled to recover against the public body or individual, in the absence of proof that the duty was impossible of fulfilment.

A public body which undertakes the construction of any work is liable for damages occasioned by its misfeasance whether the construction was obligatory or permissive.

No liability, however, attaches for damages occasioned by the non-performance of powers which are merely permissive. Wm. L. 1102

The W. Municipality possessed the power of lighting its streets and covering the furrows running along such streets, but no obligation was imposed upon it to exercise such power.

A pedestrian on a dark night fell into a furrow which was neither covered nor lighted and sustained damage in consequence.

Held, on appeal from the Magistrate's Court, that the action brought for such damage had been properly dismissed.

This was an appeal from a judgment of the Resident Magistrate for Worcester in an action in which the present appellant (plaintiff in the Court below) sued the Commissioners of the Worcester Municipality for the sum of £20 as and for damages for injury sustained by him by reason of his fall into an open and dangerous watercourse,

under the care and control of defendants in their capacity as Commissioners, and situate within the limits of the Municipality of Worcester.

The summons alleged :

1. That the plaintiff resides at Langevelei, in the district of Robertson.

2. That the defendants are Commissioners for the time of the Municipality of Worcester, and as such have the care and control over public watercourses within the limits of the said Municipality of Worcester.

3. That on the evening of the 8th May, it being at the time dark, the said plaintiff was proceeding up Tulbagh-street, near the Commercial Hotel, within the limits of the said Municipality, when he slipped and fell into a deep watercourse there situate.

4. That no rail-posts, guards, kerbstones, or fencing of any kind there exists to guard and protect or warn the public of the whereabouts of this deep watercourse.

5. That plaintiff was precipitated into said watercourse, whereby his apparel was damaged, his shoulder strained, his hand injured, and other harms and injuries he thereby suffered and sustained.

6. That defendants in their aforesaid capacity through their callousness and neglect in having left said dangerous watercourse open, unguarded, and unlighted on the night in question, are liable and responsible to said plaintiff for his said damage, injury, or loss.

The plaintiff prayed for judgment, with costs of suit.

It appeared from the evidence that the plaintiff, a farmer and shopkeeper, living at Langevelei in the district of Robertson, on the 8th May, came to Worcester, in which town he has a house occupied by his daughter. On the previous day it rained very heavily in Worcester. On the evening of the accident the plaintiff accompanied by a friend from Swellendam left his house with the intention of going to the railway-station. According to the plaintiff's evidence it was a particularly dark night, and as he arrived opposite the tap of the Commercial Hotel in Tulbagh-street he saw by the light from the hotel a pool of water in the street, he moved on one side to avoid it and in doing so trod on the embankment of an old water-furrow, which runs down the side of Tulbagh-street, the embankment gave way, the plaintiff fell into the furrow and sustained rather serious injuries, his right shoulder being dislocated and his left wrist sprained.

The man who was with the plaintiff at the time of the accident was not called as a witness.

There was evidence to show that the furrow was in existence before 1845, but there was no evidence as to who constructed it.

The Magistrate gave judgment for the defen-

dants with costs, the following being his reasons:

It was proved that Talbagh-street was made into a street by the Municipality after the year 1846 and that the watercourse in question was in existence at the time. That the plaintiff, although resident in the Robertson district, had a town residence in Worcester situate in Talbagh-street, which he frequently occupied. That on the evening in question that part of the street, near to which the plaintiff alleges that he fell into the watercourse, was not altogether dark but was partially lighted by the lamp in Lidman's public bar which, even if it did not light the whole width of the street, was sufficient to indicate to any pedestrian his whereabouts. As the plaintiff must be presumed to have known of the existence of the watercourse in question on one side of the street he should, with the aid of the lamp light, even if it was a dark night (about which the evidence was not clear) have been able to steer his way clear of the watercourse; so that in going as near to it as he relates in his evidence, he did not himself exercise ordinary care. His case is also much weakened by his not producing the only witness that accompanied him that evening, or assigning a reason for his absence.

From this judgment the plaintiff now appealed.

Mr. Graham was heard in support of the appeal and submitted that the Court had to decide two points: (1) Was there contributory negligence on the part of the plaintiff; and (2) even if there was some negligence on his part would the Municipality be liable? As to the first point there was no evidence of negligence on the part of the plaintiff, and as to the second it was the duty of the Municipality to keep the furrow from becoming dangerous.

He cited the following cases which he discussed at length: *Port Elizabeth Municipality v. Nightingale* (2 Searle, 214); *Manuel v. The Municipality of Cape Town* (8 Ros, 2); *Kimberley Town Council v. Von Beck* (1 App. Cas., 101); *Hentley v. P.E. Town Council* (4 E.D.C., 804), and *De Koch v. Town Council of Cape Town* (4 Juta, 458).

The Chief Justice referred to *Cathcart Divisional Council v. Hart* (9 Juta, 80).

Mr. Rose-Innes, Q.C., for the respondents, submitted that the first point the Court had to consider was whether there had been such negligent or wrongful conduct on the part of the Municipality as to render them liable. What duty did they neglect or what act did they improperly perform? The furrow had been in existence for fifty years and was the main source of the water supply, and must be regarded as a perennial stream. It was not clear under what statute Worcester was constituted, whether under Ordinance 9 of 1886 or Act 46 of 1882. The latter Act, section 156, gives power to alter and repair furrows, and Ordinance 9 of 1886, section 86, to

make and repair furrows. But there was nothing to show that this furrow was out of repair, therefore there was no neglect of a duty imposed on the Municipality. Paragraph 5 of the summons alleged that the furrow had been left open, unguarded, and unlighted. But there was no duty imposed on the Municipality to light, cover up, or fence in the furrow. The Municipality could only be held liable on two grounds: (1) That they had done work in so negligent a manner that others were injured; or (2) that they had neglected an express duty imposed by law. As to *Manuel v. The Municipality of Cape Town* (8 Ros, 2), and *Port Elizabeth Municipality v. Nightingale* (2 Searle, 214), these cases do not apply here as the furrow was not made by the Municipality. Again there was no neglect of duty. In *Hume v. Divisional Council of Cradock* (1 E.D.C., 104), a statutory duty had been imposed and that duty had been neglected. He also referred to *The Liesbeek Municipality v. Partridge* (4 Juta, 800).

The Chief Justice referred to *Cowley v. Newmarket Local Board* (Appeal Cases (1892), 345).

In any case there had been contributory negligence on the part of the plaintiff. That was a finding of fact by the Magistrate and should not be lightly disturbed. There was ample evidence on record to show that if it were not for plaintiff's negligence the accident would not have happened.

The appeal should be dismissed.

Mr. Graham in reply referred to Brett's Commentaries on the present Laws of England, p. 486, and to *Wakelin v. London & S.W. Ry. Company* (12 App. Cas., 41).

The Chief Justice said: The Magistrate has found that there was contributory negligence on the part of the plaintiff and that there has been no such negligence on the part of the defendants—the Worcester Municipality—as to render them liable to the plaintiff. As to the first finding there certainly is some evidence to support it. The plaintiff knew the furrow well and with ordinary care he might have avoided falling into it. His friend, who accompanied him, was not called, although his evidence would have been most valuable in throwing light upon the cause of the accident. But assuming that the Magistrate erred in his finding upon the question of contributory negligence the question still remains whether the neglect of a clear legal duty has been brought home to the defendants. A series of decisions in this Court, which it is unnecessary to enumerate, has established the proposition that a public body, which undertakes the construction of any work, is liable for damages occasioned by its misfeasance, and that it makes no difference in such a case whether the construction of the work was permissive or obligatory upon such body. In regard, however, to nonfeasance, it has been decided, notably in the case of *Liesbeek Municipi-*

painy v. Partridge (4 Juta, 800), that no liability attaches for damages occasioned by the non-performance of powers which are permissive only in their nature. Thus far the law of this country agrees with that of England. A divergence, however, does appear to exist in regard to the liability of public bodies upon whom the legal duty is cast of repairing highways vested in them. In the recent case of *Cowley v. Newmarket Local Board* (L.B. App. Cas. (1892), p. 845), to which I referred during the argument, the House of Lords held that no action lay against such a public body for damages occasioned by the highway having been suffered to be out of repair and in a dangerous condition. The decision proceeded upon the ground that, inasmuch as the surveyors of highways had been held to be free from liability for non-repairs, the public body to whom these duties, powers, and liabilities were transferred were equally free from liability. In their judgments, however, the learned Lords cast serious doubts upon the proposition which had been advanced in argument that an action lies for an injury occasioned by the omission of a duty imposed by law. Lord Herschell, for instance, says: "Among the duties imposed on the urban authority was undoubtedly the duty of keeping this highway in repair, and it is said that any person injured by the non-performance of a statutory duty is entitled to recover against the person on whom that duty rests. I entertain very grave doubts whether the proposition thus broadly stated can be maintained." He then proceeds to point out that the Highway Act, which defines the duties of surveyors of highways, prescribes the mode of proceeding, by summons before the justices, when the duty of repairing the highway is unfulfilled and the liability which is then to attend the surveyor. After the decision of the late Court of Appeal in the case of *Hume v. Divisional Council of Cradock* (1 App. Cas., 27), no doubt can be entertained as to the law of the Colony upon the question left in doubt by the House of Lords in regard to English law. Where a legal duty is imposed upon or undertaken by a public body or individual and no other remedy is expressly provided in case of non-performance, a person who, without contributory negligence, sustains damage by reason of such non-performance is entitled to recover against the public body or individual in the absence of proof that the duty was impossible of fulfilment. The omission to exercise a permissive power has been held not to constitute *culpa* in its legal sense. The omission, however, to perform a duty which has been expressly imposed by the Legislature, and which is capable of performance,

is as much a *culpa* as misfeasance in doing a work voluntarily undertaken, and the principles of the Aquilian law have been held in this Court to be as applicable in the one case as in the other. In the present case neither the Municipal Ordinance nor the Municipal Regulations impose upon the defendants the obligation of covering the furrows or lighting them at night. If the defendants had constructed the furrow in question the contention would have been legitimate that they ought to prevent it from being a source of danger, but the furrow was there before the Municipality came into existence. The utmost that can be charged against the defendants is that they have failed to exercise the powers which they undoubtedly possess for preventing pedestrians from falling into the furrow. In the absence, however, of proof that they have failed to perform any obligation imposed upon them by law, no liability attaches to them and the appeal must be dismissed with costs.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Fairbridge & Arderne; Respondents' Attorney, G. O. Silberbauer]

SELLAR BROS. V. CLARK. { 1898.
June 2nd.

Partnership—Dormant partner—Anonymous partners—Insolvency—Proof.

Goods having been supplied by the plaintiffs to one M. upon his credit alone and in ignorance of the fact that the defendant was a dormant partner of his,

Held, that the bare fact of such partnership having so existed did not entitle the plaintiffs to recover the price of the goods from the defendant.

This was a special case stated for the determination of the Court in the following terms:

1. The plaintiffs carry on business in Cape Town, the defendant is an hotelkeeper in Cape Town.

2. On or about November 8, 1891, one H. M. H. Miles entered into an agreement in writing with one D. Damm, whereby the said Miles hired from D. Damm certain hotel premises known as the Albion Hotel, and belonging to the said D. Damm, and on November 10, 1891, a supplementary agreement between the same parties was entered into. (Copies of the agreement were annexed.) The defendant and one William Madsen became sureties for the rent due under the above lease under an agreement (annexed).

3. Thereafter the said Miles entered into possession of the premises under the said agreement and carried on the business therein referred to.

4. Thereafter, in or about November, 1891, the

* Appeal to the House of Lords *in forma pauperis*. Rep.

said Miles entered into an agreement in writing with the defendant (annexed) whereunder the defendant became a partner with the said Miles under certain conditions therein specified. The defendant supplied the money in the said deed referred to. The said agreement was not signed until March, 1892.

5. The licence for the said hotel business was not transferred from the said Damm, but remained in Damm's name.

6. In or about November, 1891, the said Miles issued a notice to the public through the local papers announcing that the Albion Hotel business was under his management, but no notice of the agreement between Miles and defendant was ever given.

7. From the month of May, 1892, to the end of the month of October, 1892, the plaintiffs supplied to the said Miles goods for the purposes of the hotel business, and received certain payments therefor from the said Miles. (The dates when the goods were supplied and payments made were shown in an account annexed.) At the end of October, 1892, there was owing upon the said account a sum of £80 19s. 9d. In the above transactions the plaintiffs dealt solely with Miles.

8. On September 10, 1892, the defendant, as he was entitled to do, gave notice to the said Miles that the agreement was cancelled, the said Miles not having kept to the terms thereof.

9. The plaintiffs presumed, when they commenced to supply goods to the said Miles, that he was connected with, or supported by, some other person in the hotel business, but it was not until after the cancellation hereinbefore mentioned, and the said Miles had ceded the lease to the said Clark, to wit in November, 1892, that the plaintiffs became aware of the agreement of partnership, or of the fact that the defendant had at any time any interest in the said business.

10. The defendant never received during the existence of the said agreement any moneys from the said Miles, nor any profits or benefits from the said business, but the said business resulted in a loss.

11. Owing to the unsatisfactory state of the business, and there being a loss on the same, the defendant, as he was entitled to do under the agreement of partnership, took over the lease of the said business and such stock as was on the premises, the value of which according to an impartial appraisement amounted to £88.

12. In addition to the amount advanced to the said business by the defendant, the said Miles owed him a sum of £85 for money lent, and the said amount of £83 was taken in reduction of defendant's claim.

13. There are outstanding debts due to the said business amounting to about £60, but the defendant does not intend to make any claim in respect thereof, but has abandoned all claim thereto.

14. The said Miles is not in a position to satisfy the plaintiffs' claim. The plaintiffs contend that the defendant being the partner of the said Miles, and the business in connection with which the goods were supplied having been carried on for their mutual benefit, the defendant is liable for the balance of the plaintiffs' account.

The defendant contends under the above circumstances he is not liable to pay to the plaintiffs the sum of £89 19s. 9d., or any sum whatever. Wherefore the parties pray the judgment of the Court upon their respective contentions, and that costs may follow the result.

Mr. Graham, for the plaintiffs, relied on the judgment of Judge Mensies in "*Watermeyer v. Kerdell's Trustees*" (3 Menz, 424), and distinguished the present case from "*Guardian Insurance and Trust Co. v. Lovemore's Executors*" (5 Juta, 206). He also referred to "*Lamb Bros. v. Brenner*" (5 E.D.C., 152), to Van der Linden, 576, 576, 578, and to Potier on Partnership (Ch. 2, 60, 61, Ch. 6, 102) and to clause 9 of the agreement.

Mr. Searle, for the defendant, cited "*Guardian Insurance and Trust Co. v. Lovemore's Executors*" (5 Juta, 206), Voet, 17, 2, 18, and 15, and referred to the last clause of the agreement as being in defendant's favour.

Mr. Graham in reply.

The Chief Justice said: It is clear from the special case that the plaintiffs supplied the goods to Miles upon his credit only and in ignorance of the fact that he had entered into partnership with the defendant. There was no privity of contract, therefore, between the plaintiffs and the defendant entitling the former to sue the latter for the piece of the goods. The bare fact that the defendant was a partner of Miles at the time when the goods were supplied to Miles for the benefit of the partnership is not sufficient to give the plaintiffs the right to sue the defendant. Upon this point I need only refer to my judgment in *Guardian Insurance Company v. Lovemore's Executors* (5 Juta, 212). It would have been different had the estate of Miles been sequestrated as insolvent, for the provisions of the Insolvency Ordinance would have come into operation. That Ordinance makes no distinction between known and dormant partners and confers on the creditors of an insolvent partnership estate the right of obtaining satisfaction from any partner. They may apply for the sequestration of the separate estate of any such partner (section 9), and having succeeded they may prove and rank upon his separate estate for any deficiency in the partnership estate, the only limitation being that the creditors of such separate estate shall first have been satisfied (section 84). And in regard to a solvent partner it was held in the case of *Watermeyer v. Kerdell's Trustees* (3 Menz, 484), that even if he is an anonymous partner he cannot claim out of the

assets of the partnership estate payment of the debts due to him individually until all the debts due to him by the partnership are first discharged. In the present case the partnership resulted in a loss, and no question arises whether the defendant is entitled to recover anything from the business in competition with the plaintiffs. The special case states that Miles is not in a position to satisfy the plaintiffs' claim, but there is no allegation that his estate has been sequestrated as insolvent. In the absence of such an allegation I am of opinion that the defendant's contention is correct and that the plaintiffs are not entitled to recover.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. J. & H. Reid & Nephew; Defendant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

REGINA V. GRENELLI. { 1898.
June 2nd

Sunday observance—Ordinance 1 of 1838, section 2—Contravention—Sale of ginger-beer and fruit—Conviction sustained on appeal.

This was an appeal from the conviction of the appellant by the Acting Resident Magistrate for Cape Town. The accused was charged with contravening section 2, Ordinance 101, 1838, by keeping his shop open for the purpose of trade and selling one bottle of ginger-ale and a quantity of apples for the sum of 6d. to one Peter Michaelis, on the Lord's Day, the 9th April, 1898.

The accused was found guilty and sentenced to pay a fine of £2 or fourteen days' hard labour.

The evidence was clear that the accused did sell the ginger-ale and apples and that his shop was open on Sunday, the 9th April, 1898. The Magistrate found the accused guilty and sentenced him to pay a fine of £2 or to undergo imprisonment for fourteen days with hard labour.

The Magistrate made the following remarks: I find that the accused keeps a general dealer's shop and that on Sunday, the 9th April, 1898, he kept it open for the purpose of trade in contravention of the Ordinance. On this point the witness is positively certain, and also that out of the same shop accused sold ginger-beer and apples. The witness sent in a boy for the purpose of buying these things and saw him coming out of the shop with the apples, he takes the boy back again at once, and there an employee admits in presence of accused, both being behind the counter in the shop, that she did sell the ginger-beer and apples to the boy who subsequently disappeared. The accused also pleaded "guilty to the sale of ginger-beer," when his agent at a

later stage asked for the substitution of an amended plea of "not guilty." The object of the Sunday Observance Ordinance would be defeated if shopkeepers were allowed to keep open their shops under the pretence of selling only ginger-beer and fruit on Sundays while the Ordinance prohibits the sale on that day of even such articles as fish and milk between nine a.m. and four p.m.

The accused now appealed.

Mr. Graham, for the appellant, remarked that the only point to be decided was whether the selling of a bottle of ginger-ale and a few apples on Sunday in a shop amounted to a contravention of the Ordinance.

Mr. Giddy, for the Crown, was not called upon.

The Chief Justice said the Court could not interfere with the decision of the Magistrate. It was admitted that the appellant did keep a shop, and that he did keep it open on the Sunday in question for the purpose of selling ginger-beer and apples. He kept it open "as a shop for the purposes of trade;" and having done so, he had contravened the second section of the Ordinance. The appeal would therefore be dismissed.

Their lordships concurred.

[Appellant's Attorney, J. Hamilton Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. JACOBS. { 1898.
June 6th

Master and Servant—Act 18 of 1873, section 2, sub-section 2—Conviction quashed on review.

Mr. Justice Buchanan said this case had come before him as judge of the week. It was on review from a judgment of the Special Justice of the Peace for Garies, where prisoner, John Jacobs, was convicted of contravening section 2, clause 2 of Act 18, 1873. To contravene that section it was necessary that a servant should be absent from his master without leave or lawful cause. In this case want of lawful cause was not alleged in the summons, nor was there any evidence to support such finding, and on these grounds the conviction must be quashed.

WYNBERG MUNICIPALITY V. { 1898.
CLAYTON, N.O. { June 6th.

Costs—Analyst's fee—Taxation—Review.

Application should be made at the trial for any special costs which a successful party wishes to be adjudged to him.

This was an application for a review of the taxation by the Taxing Master of the applicant's bill of costs in the recent motion heard on the 11th May last (*ante*, p. 164).

An item of £10 10s. appeared on the bill of costs, being Dr. Marloth's fee for certain analyses which he had made of the water discharged from the Wynberg Camp, and which analyses were necessary for the purpose of the applicant's case, and had considerable weight with the Court.

In the absence of a special order of the Court, the Taxing Master disallowed this item, on the grounds that these expenses were incurred in qualifying a witness to give evidence.

Mr. Searle was heard in support of the present motion, and relied on *De Villiers v. The Divisional Council* (Buch., 1876, p. 122).

The Chief Justice: Why was an application not made at the hearing of the original motion, when the facts were fresh in the memory of the Court?

Mr. Searle: We did not anticipate that the item would have been disallowed. As to the English practice, counsel referred to the following authorities: *Mackley v. Chillingworth* (L.R. 2, C.P.D., 272), *Turnbull v. Janson* (L.R. 3, C.P.D., 265), *Smith v. Buller* (L.B., 19, Hq., 478), and *Batley v. Kynock* (L.R. 20, Hq. 682).

Mr. Rose-Innes, Q.C., for the respondent, contended that the expenses incurred by witnesses qualifying to give evidence had never been allowed by the Court. Even in the case of surveyors, the cost of their plans was only allowed, and not the cost of surveys. Counsel cited and discussed the following cases: *Kennedy & Clair v. Port Elisabeth Harbour Board* (5 E.D.C., 387), *Stewart v. Gillet* (December 11, 1890, not reported), and *Omerod v. Thompson* (16 M. & W., 860).

Mr. Searle in reply.

The Chief Justice said: The taxing officer was quite right in not allowing these costs without a special order of the Court. The proper course in cases of this kind is for the successful party to apply as soon as judgment has been given for any special costs which he wished to be adjudged to him. The whole matter would then be fresh in the recollection of the Court, and it would save the expense of a fresh application. In the present case, I am quite satisfied that if an application had been made on behalf of the Municipality immediately after the judgment had been given,

the Court would have granted the application. The circumstances were certainly special. I quite agree, as a general principle, that costs incurred for the purpose of qualifying witnesses to give evidence ought not to be allowed. It was, however, a rule subject to exception. The case of *De Villiers v. The Divisional Council*, which had been quoted, was one of these exceptions. In that case a plan had been found necessary to assist the Court, and the expenses of the surveyor not only in framing that particular plan, but in surveying the property, were allowed. In the present case, it was stated by the Court when judgment was given, that the Court was mainly influenced by the evidence of Dr. Marloth, who made the analysis. I think the fees paid to Dr. Marloth for the purpose of making the experiments ought to be allowed. It is a very special case, and I think that the great assistance which the analysis afforded the Court ought to be paid for. As to the costs of this application, the respondents might well have offered to have allowed the fee of £10 10s., but considering they have opposed, the application will be granted, but with costs of opposition only.

Their lordships concurred.

[Applicants' Attorneys, Messrs. Tredgold, McIntyre & Biset; Respondent's Attorneys, Messrs. Van Zyl & Buissinad.]

ADAMS V. COLONIAL GOVERNMENT. { 1898.
MENT. { June 6th.

Mr. Searle, for applicant, moved for leave to sue *in forma pauperis* in an action against the Colonial Government for recovery of damages by reason of the unskilful and improper treatment of applicant by a Government medical officer while applicant was suffering from the effects of an accident which happened to him while on duty.

Mr. Searle was appointed to take the reference

SNOOKE V. ELLIOTT.

Mr. Searle applied for the attachment *ad fundandam jurisdictionem* of certain pieces of quitrent land, lot G. of the Kai Bridge farm, in the district of Queen's Town, the property of respondent, in proceeding about to be instituted by edictal citation for the recovery of the amount of two promissory notes.

The Court granted leave to sue by edictal citation and made the rule returnable on 12th July; personal services.

IN THE MATTER OF THE MINORS LE ROUX.

Mr. Shell moved for authority to the father of the minors to sell their shares of the farms Oude

Muragie and Uitving, in the district of Oudtshoorn, and apply part of the proceedings in payment of a mortgage bond on the farm Van Wyk's Vley, and the balance in improvements on the said last-named farm, in which they also hold shares.

The Court made the order in terms of the Master's recommendation.

LOGAN V. READ AND ASH. { 1898.
June 6th.

Loan—Defence—Repayment out of profits.

This was an action instituted by Mr. James Douglas Logan, of Matjesfontein, against the defendants, the captain and secretary of the English Cricket Team, which visited the Colony in 1891, for repayment of the sum of £750, alleged to have been lent to the defendants at their special instance and request, and which they refused to repay.

The defendants in their plea alleged that in or about the year 1891 they and one Bridgette entered into a partnership by which it was agreed that money should be contributed by the said partners to form a common stock for the purpose of taking a cricket team to this colony to play cricket matches, the said defendants and the said Bridgette to share in the losses and the profits arising therefrom, and thereafter in or about the month of January, 1892, the said Bridgette, by mutual consent, retired from and ceased to be a member of the said partnership upon conditions unnecessary to specify, and thereupon it was agreed between the plaintiff and the defendants that the plaintiff should become a member of and share in the said partnership in the place and stead of the said Bridgette, and it was agreed that the plaintiff should contribute the sum of £750 to the common stock for the purposes of paying the expenses of exploiting the said team, and that the plaintiff should share in the losses and profits arising from the said partnership.

That thereupon the plaintiff paid the said sum of £750 as aforesaid. The said partnership resulted in a loss, and the said £750 were spent in payment of expenses. Wherefore the defendants prayed that the plaintiff's claim might be dismissed with costs.

At the commission which was held in England the following amended plea was filed:

The plaintiff did not lend the sum of £750, or any part thereof, to the defendants, or either of them personally.

The defendants were respectively captain and secretary of an English cricket team, who, in consideration of certain fees and gate-money, had

arranged to play, and at a date hereinafter mentioned were in course of playing public cricket matches in the Colony.

In the month of January, 1892, the plaintiff paid to the account of the defendant Elwin Ash, acting as secretary as aforesaid, £750 for the purpose of paying the expenses of and incident to the playing of the said public cricket matches, and of the tour of the said cricket team, and upon the express condition that the same should be repayable only out of the profits arising out of the said tour.

The said tour resulted in a loss, and the said £750 were spent in payment of expenses.

The replication was general, and on these pleadings issue was joined.

Mr. Searle and Mr. Sheil appeared for the plaintiff; and Mr. Juta and Mr. Graham for the defendants.

James Douglas Logan, plaintiff, deposed: I know defendants Read and Ash. I first met Ash in 1891, when he came out with the football team. I remember defendants and the cricketers arriving in December, 1891. I came down from Matjesfontein to see them. Ash introduced me to Read and a man called Bridgette. There were about ten professionals and four supposed amateurs. We all stayed at the Royal Hotel. While there Read told me that Ash was rather down in the mouth and asked me to try and cheer him up. I went and spoke to Ash. He told me he was in a hole, and that Bridgette, the financial manager, could not get him out. Bridgette's wife, who was in England, and who had become surety for £750, the expenses of the team on the way out, was unable to meet the account, and I was told that the money must be paid before Christmas, otherwise the team could not go on the tour. Ash said he had cabled home to see if Mrs. Bridgette had paid the £750. I offered to go with them to Currie's office. They declined, and said they would prefer to wait the answer to the cable. Ash asked me if I could not assist him or get some one to assist him in the event of his receiving an unfavourable cablegram. I asked him if that was the position of the team at the time. He said it was, and I said, "Well, in the interest of cricket, I will advance you money up to £1,000." He offered to give me 80 per cent. of the profits for the loan, but I told him I did not make money out of sport. I wanted my money back before they left and a fair and reasonable interest for the loan for the time they had it. I told him if there was anything over they could give it to the "boys." I meant the professionals. After this I saw Read, and he thanked me for my kindness. On the 24th December I left for Matjesfontein. I received a letter from Ash, dated 26th December, stating that the cable reply was not satisfactory, that they (Read and Ash) must run the show themselves, and asking

me if I was open to give them the financial help I had promised. I replied that what I had offered to do in Cape Town still held good, and I mentioned that we would go into the matter thoroughly when they came to Matjesfontein on their way to Port Elizabeth. I also said in my letter that if they were in need of £300 or £800 they could draw on me at sight at the Standard Bank. By this time I understood that Bridgette was out of the affair. The team arrived at Matjesfontein on 80th December, and I entertained them that day. They left at 8.30 following morning, but before the train started I went into the compartment where Reid and Ash were sitting. They asked if I was still prepared to advance the money. I asked what they wanted it for. They said that this £750 was for expenses from London, and other expenses had been incurred since coming to Cape Town. In all they would need about £1,000. I asked, "What about the money you got in Cape Town for the matches you played there?" Ash said, "I have not got the money yet, and I won't get it till we arrive at Port Elizabeth." I told them I would think the matter over, and telegraph the money on. Before leaving the carriage they again offered me 80 per cent. of the profits. I repeated that I wanted no profits, that I did it for sport, and if there were any profits they could give it to the professionals. They then left for Port Elizabeth. I telegraphed the money on the 4th January—£750. That was the amount which I calculated they required. I also wrote to them, setting out the terms of the loan. Some time afterwards I met defendants at Kimberley. I lunched with them on the cricket ground there. They had been through Natal and the Transvaal. I spoke to them about money matters in the pavilion. They asked me if I could not take a team Home to help them to recoup their loss. From this I understood that they had not been very successful. I told them that I did not think a Cape team would pay. Three or four days afterwards I was in Cape Town. That would be about 19th March. The team were then playing their final matches. On the evening of the 19th I waited in the pavilion at Newlands for the purpose of seeing Read. He did ultimately come over, and I asked him to go into Cape Town with me, and he said, "I can't, old chap, I am going to dine with Richards." He referred me to Ash, and said he hoped to see me in London. I went to find Ash; I lost him on the way, but I waited at the railway-station till I got him.

And what happened then?—I asked him to dine with me at the Royal. We discussed the £750 loan after dinner, and on the way to the White House I said to Ash, "Daddy, I suppose you've got that cheque for me." He said something about Read having to

do with the matter, and I said, "That won't suit me, I must have the money before you leave the country." He then began to cry, and said, "Don't blame me; I told Read you would never stand it." Ash further asked me to write to Read and tell him plainly that I must have my money, but not to mention his (Ash's) name or he would get into trouble. Ash seemed to be afraid of Read. Ash came to see me off at the station that night. On arriving at Matjesfontein, I wrote to Read, stating plainly that I wanted the £750 before he left the Colony, and that I was willing to forego the interest. I handed this letter to my manager, Mr. Wright, who left for Cape Town on the Sunday night. Afterwards I received a telegram from Read, asking me to come to town to see him. My manager was then in Cape Town with the letter, so I wired: "Impossible to come to town; you can settle with Wright, who holds my power." Acting on my instructions, Read and Ash were arrested on 23rd March. I never was consulted in any way about this team. I dealt strictly with defendants in the interests of sport and as between gentlemen. I never heard of a man named Kelly who had put in £1,000 before the team left England. I did not know that Murdoch and the other amateurs were receiving considerable sums of money out the tour.

Cross-examined by Mr. Juta: Did you not ask who Bridgette was?—No, I had nothing to do with that.

Then why in your letters do you describe him as a "boulder," and why did you recommend them to wipe the back yard with him?—Because he was regarded as a rank outsider by the team. He was not a cricketer.

You knew that he was the financial manager of the team?—I was led to believe that Mrs. Bridgette had supplied the necessary security.

What do you mean by "going into the matter thoroughly," which is the expression in your letter regarding this loan?—The matter I refer to was the £750 or £1,000.

You wanted to go into the whole state of affairs and to discover what money was in the concern?—No, I only wanted to see why they wanted £250 in addition to the £750 which they needed to defray their passages.

Did you not go into the team's books at Matjesfontein?—I did not.

Are you aware that Read, Ash, and Murdoch swear that you took the ledger in your hands in the saloon and went through all the figures?—I swear I did nothing of the kind. I knew nothing whatever about their books.

You knew that Murdoch, the amateur, had no interest in the matter?—I should think he had an interest if he was getting £850.

Mr. Justice Upington: I was not aware that these gentlemen were paid.

Mr. Juta : They were paid for loss of time, my lord.

Mr. Juta (to witness) : They all swear that you (Mr. Hogan) offered to take Bridgette's place and become the financial manager of the team, that in fact it was upon that condition you advanced the money ?—That is not the case. I offered to lend Read and Ash £750, but I did not say I would put £1,000 into the team. I didn't do it. I admit I know something about cricket, and I should say there was a fair gate at the Cape Town matches. I had not that in view when I offered to lend £750. I was to get a fair interest for the loan. I consider 7 or 8 per cent. fair interest. That was not sharing the profits. I do not consider interest in the light of profit.

Did you ever see that book ? (Ledger produced.)—No, I swear that I did not know that the tour of the team was a financial failure. At Kimberley I admit it did not appear to be successful. As to what has been said about a team going home, I never mentioned that it might assist me from a political point of view. What have I to do with politics ? I am not a politician. The team, according to defendants, could be sent to England and put under the auspices of the Marylebone and Surrey Clubs.

By the Chief Justice : How would your taking a team to England benefit Read and Ash ?—They would make all the necessary arrangements.

By Mr. Juta : What did you mean in your letter to Ash when you wrote that you believed in keeping capital as low as possible and there would be a larger dividend ?—I meant that if I advanced £750 instead of £1,000 they would not require to pay so much interest.

Coming to the arrest, you sent your manager down on the Sunday, and Read and Ash were arrested on the Monday ?—No, they were arrested on the Wednesday morning ; I did not see defendants again in this country. I saw Read at a cricket match at Edinburgh. He asked me whether it was to be peace or war, and I replied if he meant by war that I intended to get my money, there would be war.

Re-examined : There never was any talk of making me a substitute for Bridgette.

By the Court : When I made this advance I had only Read and Ash in my mind, not the cricket team. Whether they got money or not, I expected to be refunded. I never saw any agreement between defendants and Bridgette. I was never consulted with regard to the team.

The Chief Justice : You were sanguine of their success. You said it was in the interests of sport. Did you really give the matter a thought ?—I certainly thought I was advancing to Read and Ash and not to the team.

Mr. William Henry Milton, captain of the Western Province Cricket Club, said he was also

captain in 1891, and president of the Western Province Cricket Union. He acted with Mr. Ash as secretary to the English Team, and on the 29th December, 1891, he paid to him a cheque for £680 14s. 5d., the English Team's share out of the gates taken at Newlands during the first visit of the English Team. It was wholly incorrect if it was stated that the English Team had not been settled with before they left Cape Town.

Mr. Ernest Orpen, teller at the Standard Bank, proved the passing of the cheque made payable to Read and Ash.

Samuel Moore Wright, manager for Mr. Logan, said Mr. Logan arrived at Matjefontein from Cape Town on March 20, 1892. Witness left for Cape Town the next morning, and took a letter from Logan to Read. He saw Read at the Royal Hotel, and on reading the letter Read said, "Oh, there is some mistake about this, it was entered into as a speculation." Witness replied he knew nothing about it, he only wanted a cheque. He afterwards saw Read again, and Read said he had had a telegram from Logan, saying he (Wright) could settle it. Witness said, "Yes, but only by a cheque." Afterwards a letter was sent by plaintiff's attorneys to Read and Ash, but, as there was no satisfactory response, after leaving it to the last moment, he had the defendants arrested.

Cross-examined : The particulars given in the affidavit were given by witness, but not on instructions strictly from Mr. Logan. Messrs. Read and Ash were sued as captain and secretary of the English Cricket Team.

Mr. William V. Simkins stated he met Messrs. Read and Ash the day they arrived from England. He also saw Bridgette. He was told by Read and Ash that Bridgette had come out partly to finance the team, but later he was told that his wife had failed to pay the balance of the passage money, and consequently Bridgette would have to go back. The statement that Bridgette had met with a bereavement at Home was, he was told, only an attempt to smoothly cover his retreat. It was generally known among all sportsmen that Bridgette had to return owing to his failure to find the cash.

Mr. Conrad C. Silberbauer, Deputy Sheriff, said the defendants were arrested under a warrant from his office. They called friends to their assistance to give security for the amount claimed, and Mr. Richards consented to endorse a cheque in favour of witness given by Messrs. Read and Ash to his favour on the latter promising, as brother sportsmen, that it would be all right and duly honoured. On the following morning at nine o'clock the cheque was presented and dishonoured. Witness mentioned the matter to Richards, who was outside the bank. Richards asked witness to let the matter stand over for a short time, and

about 9.45 a.m. witness was informed that he could present the cheque and that it would be paid. The cheque was afterwards presented and duly paid.

William Macfarlane, clerk in the Castle Mail Packets Company's office, Cape Town, said the cost of the English Team coming out by steamer was about £900 return passage. On their arrival at Cape Town, he received a draft for £750 at sight, jointly signed by Read, Ash, and Bridgette. It was a personal draft, but understood to be on behalf of the English Team. He had instructions from England on the matter not to demand the money at once. Instructions were given not to press for the money till two months after the arrival of the team in the Colony, but it was arranged that should finances allow it, they should pay it as soon as possible.

This concluded the case for the plaintiff.

The defendants' evidence was taken on commission in London.

William Lloyd Murdoch, duly sworn, stated: I went to South Africa with the English Cricket Team in 1891. I had nothing to do with the getting up of the team or the financial arrangements. I did not know the plaintiff before I went to South Africa in 1891. I was introduced to him in December, 1891, in Cape Town. I went to Matjesfontein, Mr. Logan's place, on December 28, 1891. We all spent a day with him, and went on to Port Elizabeth on December 31. I discussed the pecuniary business in regard to the team with plaintiff on December 30 and 31. On December 30 I saw plaintiff with the defendant in plaintiff's office, but had no communication with them. When they came out plaintiff spoke to me. He said, "We can't do any business to-day." Before that he had said, "We have been talking matters over." He went on, "As I think it had better be deferred until to-morrow, when I will be all right, as we are all very jolly, and we can't talk business now." He added, "You know I am going to take Bridgette's place, and take the hump off Daddy's shoulders." "Daddy" is the defendant Ash. He also said he would look at the books of the team in the morning. On 31st December I saw plaintiff in the compartment of our railway carriage, which was occupied by the defendants. I was passing outside the compartment and saw them together. I saw the plaintiff with a book like a ledger in his hand. Subsequently the plaintiff spoke to me on the platform. He came out of the defendant's compartment. He said, "Well, old man, I've settled all. I have had a look at the books, and everything is most satisfactory. I intend putting £1,000 into it. I don't want to make a single penny out of it, and if anything is made I intend it a present to the boys." I understood him to mean the professionals by the "boys." I said, "Well,

Logan, it's very good and very liberal of you indeed, and judging from what we were told, and the results of the Cape Town matches, I think the tour is bound to be a big success in every way." He said he had no doubt about it. I met plaintiff again at Kimberley about the early part of March. There was a match, and plaintiff was talking to defendants at lunch. As I was going out they called me. There was a conversation about a Cape team coming to England, and plaintiff bringing it over. While we were talking Mr. Read said to the plaintiff there is sure to be a loss over this team, and should you take a team to England you'll be sure to be recompensed, as it's sure to be a success. Plaintiff said he thought the idea a very good one, and that he thought it would do him a great deal of good from a political point of view. On the way down to Cape Town he spent some hours at Matjesfontein. He joined us again at Cape Town. From first to last plaintiff was on the most friendly terms with us. The witness admitted in cross-examination that he was to receive £850 to cover the losses which his business matters would incur in consequence of his going to the Cape, and that he did actually receive £275 in addition to his expenses.

Mr. John Francis Kelly deposed to his entering into an agreement with Bridgette, Ash and Reid, by which, in consideration of his paying £1,000, he was to receive 40 per cent. of all the gate moneys within nine months of the date of the agreement (7th November, 1891). The witness admitted that he had been repaid £750, namely, £250 from Read, £250 from Ash, and £250 from one Wells, who had now run a joint risk with him in regard to the team.

Walter William Read, in his evidence, stated the circumstances under which he met Bridgette and consented to act as captain of the team. It was arranged that he should receive £850* and all expenses paid in consideration

* The agreement between Reid and Bridgette appears from the following letters which were put in at the Commission: Rep.

1, Queen-street, City, October 26th, 1891.

DEAR SIR,—In reply to your letter, I beg to say that I shall be pleased, in the event of the team going to the Cape, to accompany you with same, on the following conditions namely, that the sum of £850 clear be given to me for loss of business and time; all first-class travelling and out of pocket expenses to be paid by you. It was, I think, thoroughly agreed between us that the sum of £500 be paid to me before leaving England, and that an acceptance (payable on my return to England) be given for the remainder, £350.

I am merely suggesting that this should be the course adopted, as it is much better that both of us should have business matters settled between us before starting. I think you thoroughly understand

of loss of business and time in coming to the Cape. The witness stated that at the interview at Matjesfontein, on the 31st December, plaintiff examined the books of the team (made some figures in pencil on a page of the ledger), and said he would put £1,000 into the venture. Witness then said to him, "You will take Bridgette's place and have 40 per cent. of the profits." He replied, "I don't want to make a profit, whatever profit there is I shall give to the boys (meaning the professionals). Witness said it was very liberal of him (plaintiff), and he trusted the tour would pay. He said, "I don't mind a loss of £300 or £400, but I do not want to lose all." Whereupon he shut up the ledger and said, "Let's go and have a drink." Witness next saw plaintiff at Kimberley in the early part of March at a cricket match at lunch. He told Logan his money was gone, and that he (witness) was sorry the trip could not pay. He said, "I'm very sorry, but it can't be helped." Witness further said, to recoup Logan for his loss, if he would bring a team to England he (Read) would get it under the auspices of the Marylebone and Surrey Clubs, and that he would soon get his £750 back. He said, "It's a very good idea, keep it a secret, and don't mention it to anyone in Cape Town." Logan in no way suggested that witness was indebted to him then, or at all, until the 21st March, when Wright presented Logan's letter demanding payment of the £750. Witness denied all liability.

The defendant Ash generally corroborated Read's evidence, more especially with regard to the interview at Matjesfontein on the 31st December, and stated that Logan never suggested that he and Ash owed plaintiff £750, but added that he could not swear absolutely that he (Logan) did not say so.

that this arrangement was strictly between ourselves, and that if any objectionable notices appear in the public press, that I shall look to you as promoter of [the team to flatly contradict the same. This agreed, it will materially influence me in my decision regarding the making of the trip, for I am absolutely sick of the Press writing, no doubt under a mistake, statements that are absolutely unfair.—Yours faithfully,

WALTER WM. READ.

A. E. Bridgette, Esq.

Mr. Bridgette's reply, undated but duly stamped, was as follows:

DEAR SIR,—In reply to yours of the 26th October, I shall be perfectly willing to agree to your terms for South African tour, namely £350, to be paid as follows: £500 before leaving, and an acceptance for £350 payable on returning to England. Trusting we shall have a pleasant tour.—I am, yours truly,

E. BRIDGETTE.

P.S.—I paying all first-class travelling and hotel expenses.

Counsel having been heard, the Court delivered judgment.

The Chief Justice said: The plaintiff's case under his amended declaration is that he advanced some £750 to the defendants, Read and Ash, personally, and he now seeks to recover the sum so lent. The first plea filed on behalf of defendants was that they had come out from England with one Bridgette; all were partners in the concern, the object being to play cricket at the Cape; that the three were to share in the profits; that Bridgette retired from the partnership, and that the plaintiff then took Bridgette's place and became one of the three partners. Now, in support of that plea there was some slight evidence, especially the passage from Logan's letter which had been so much relied upon by Mr. Juta: "As I always believe in keeping capital as low as possible, I thought it best to send the amount (£750), so that when the dividend is declared you will be able to get a very much larger proportion than if I had sent £1,000, which I fully explained to you when we talked the matter over." As had been remarked in the course of the argument, if Logan here had said, "So that when the dividend is declared we shall be able to get a very much larger proportion"—undoubtedly that would have gone far to show that a partnership was intended. But the words quoted had reference solely to Read and Ash. On the other hand, the letter, written by Ash himself on 26th December, 1891, appears to me to be quite inconsistent with any partnership entered into by Logan, for it states, "Respecting Bridgette, as I know you are a business man, I come straight to the point. The cable reply to our inquiry, 'Have passages been paid?' (which really means, has Bridgette met his promises), is 'No.' To put it plainly, as you kindly promised to help us, the matter stands thus—as he has not met the passage money on the other side (England), we have to pay, to keep our word, £750, also about £150 for the reduced railway fare, before leaving Cape Town, also about £150 for a fortnight's expenses at the Royal. Under the circumstances, Bridgette not having fulfilled any part of his contract, we must now absolutely 'run the show' ourselves. If you are still of the same mind to help us financially, we shall be very pleased, and can talk it over with you when we hope shortly to meet to make it beneficial to all parties in return for your generosity." This (continued the Chief Justice) is not the language which would be used by two partners who are thanking a third person for coming into the partnership—to share with them. Defendants before the Commissioner appointed in England put in a fresh plea. That plea took quite a new departure. The defence then raised was that the plaintiff "did not lend the sum of £750 or any part thereof to defendants or either of them person-

ally. Defendants were respectively captain and secretary of an English cricket team, who, in consideration of certain fees and gate-money, had arranged to play and were in course of playing public cricket matches in the Colony. In the month of January, 1893, plaintiff paid to the account of defendant Edwin Ash, acting as secretary, £750 for the purpose of paying the expenses of and incident to the playing of the matches and of the tour of the cricket team, and upon the express condition that the same should be repayable only out of the profits arising out of the tour. The tour resulted in a loss, and the said £750 were spent in payment of expenses." Now, continued his lordship, there is no evidence in support of that plea as it here stands. There was some evidence in support of the original plea. The expression "English Cricket Team" is here used, but what does it mean? It is not an entity at all. The only persons who were financially interested in this concern after Bridgette left were Read and Ash. Murdoch says he had no financial interest in the matter. It is not clear that the others had no interest in the matter. On the contrary, these so-called amateurs actually received large sums of money from the two partners Read and Ash. Therefore, the only two persons to whom the plaintiff could look for his money were the defendants. Then, with regard to this plea, even supposing there was some evidence to support it so far as the original contract is concerned, there is no evidence to show that the tour did result in a loss. It was for the defendants to prove to the Court and to bring forward clear and conclusive evidence that the tour had actually resulted in a loss, but no regular account had been laid before the Court to prove that such was the case. Therefore, we have to fall back upon Mr. Logan's evidence, and he is most positive that when he advanced the money he looked to Read and Ash to repay it. *Prima facie*, that would be the presumption in every case. Where a person lends money he looks for repayment by the person to whom the money was lent. Therefore, if there is any doubt in this matter, I should give the benefit of the doubt in favour of the person who has lent the money. Logan swears most positively that he looked to no one else but defendants for repayment. The evidence of defendants does not disprove his statements, and therefore the judgment of the Court will be for plaintiff for the amount claimed with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buismé; Defendants' Attorneys, Messrs. Fairbridge & Arderne.]

BUCK V. REGISTRAR OF DEEDS. { 1898.
June 6th.

Deed—Registration—Practice.

A deed, although lodged in the Deeds Office, is not considered as passed until it has been signed by the Registrar of Deeds.

Mr. Searle moved for an order directing the Registrar of Deeds to pass transfer on a certain deed executed by the applicant in favour of the Lord Bishop of Cape Town.

The facts are these: On the 8rd June, 1898, the applicant's attorney lodged with the Registrar of Deeds for registration a certain deed of transfer passed by the applicant in favour of the Lord Bishop of Cape Town. On the 6th June the deed was rejected by the Registrar on the grounds that an order of Court had been filed with him preventing the applicant from transferring any property.

The order of Court was lodged with the Registrar of Deeds on 5th June, or two days after the deed of transfer had been lodged.

The Court refused to grant an order and held that a deed was not passed* until it had been signed by the Registrar of Deeds.

[Applicant's Attorney, Paul de Villiers.]

* The practice in the Deeds Office has been to allow six days to elapse between the lodging of the deed and its being signed by the Registrar. In the interval it is examined, and if found correct it is signed by the Registrar and dated as being passed before him on the day on which it was lodged.

This practice will probably be changed soon and a new rule adopted for future guidance. Rep.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

LEWIS V. VAN ZYL. { 1898.
June 13th.

Mr. Buchanan moved for provisional sentence on a promissory note for £118 17s. 4d.
Granted.

BLAKE V. ROSSOUW.

Mr. Juta moved for provisional sentence on a promissory note for £21 8s. 4d.
Granted.

REID AND NEPHEW V. LOCKE.

Mr. Shell moved for final judgment for the sum of £7 2s. 10d. in terms of a consent paper filed.
Granted.

LANCASTER V. B.A.M.

Mr. Maakew moved for the final adjudication of defendant's estate.
The Court made the order.

THE MASTER V. CHAPMAN'S EXECUTORS.

Mr. Giddy moved for an order in the usual terms.
Granted.

THE MASTER V. SWANSON'S EXECUTORS.

Mr. Giddy moved for an order calling upon defendants to file an account.
The Court made the order.

STANDARD BANK V. FERRERA.

Mr. Barber moved for judgment for £405 15s. 2d. being the balance of an overdraft on the Standard Bank, with interest at 6 per cent. from May, 1898.

REHABILITATIONS.

On motion from the Bar, the following rehabilitations were granted: J. H. Whitehead, Alexander Lindsay, H. C. Slabber, and B. S. Hudson.

GENERAL MOTIONS.

DORMEHL V. DORMEHL.

Mr. Searle moved on behalf of petitioner (Elizabeth J. P. Dormehl) for leave to sue in *forma pauperis* in an action against her husband

for divorce by reason of his alleged adultery, and for custody of the children of the marriage.

The Court appointed Mr. Searle to take the reference

HISCOCK V. COETZEE.

Mr. Searle moved for leave to sue by edictal citation in an action about to be instituted against Abel Daniel Coetsee for transfer to applicant of certain shares in landed property, situated in the district of Somerset East.

The Court made the order, personal service if possible, failing which one publication in the "Barberton Herald," the rule to be returnable on 1st August.

WILSON V. COLONIAL GOVERNMENT.

Mr. Graham asked the Court to make absolute the rule nisi admitting applicant to sue in *forma pauperis* in an action for the recovery of damages for wrongful dismissal from his post of engine-driver.

The Chief Justice, in granting the order, expressed his opinion that counsel ought to look well into cases of this kind before bringing the matter under the notice of the Court.

Mr. Graham was appointed to take the references.

BERRY V. BERRY.

Mr. Molteno asked the Court to make absolute the rule nisi admitting applicant to sue in *forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce. This was the return day of the rule, and personal service had been effected.

The Court made the order, and appointed Mr. Molteno as counsel.

BANK OF AFRICA V. BORLIN. { 1898.
June 12th.

Provisional sentence — Promissory note — Liquidity.

Mr. Searle moved for provisional sentence for the sum of £432, 8s. 6d. with interest from the 22nd May, 1898, on the following document,

Disbursements.

£432 8s. 6d., *sg. No. 17556. Mobile, Feb. 11th 1898.*

Five days after arrival (or upon collection of freight, if sooner made) or 100 days after date, whichever takes place first, of the Swedish barque Carlotta under my command at the Port of Cape Town or any place at which her voyage may terminate, I promise to pay to the order of Bahr Bekrend & Ross the sum of four hundred and thirty-two pounds eight shillings and six pence British sterling, in approved banker's demand bills on London, for value received, for necessary disbursements owed

by my vessel at this port for the payment of which I hereby pledge my vessel and her freight; and thereby assign to the legal holder of this obligation, all my lien and claim against freight, vessel and owners, with power to take in my name any and all steps necessary to enforce the same, and my consignees at port of discharge are hereby instructed to pay this obligation, and deduct the amount thereof from the freight due said vessel; in case of non-payment, the holder shall also be entitled to the benefit of all liens in law, equity, or admiralty, which the masters or owners of the vessel may be entitled to against part of the cargo or its owners for freight, compress or other charges on cargo paid by the vessel or Master at the port of loading. This claim to have priority of payment over all others that may be presented against the said freight and vessel. My vessel is now lying at the port of Mobile, Ala., loaded with lumber and ready to sail for Cape Town.

Signed in triplicate, one being accomplished the others to stand void.

J. F. Borlin,
Master of Carlotta.

The Chief Justice, in granting provisional sentence, said: I do not think it advisable for the Court to take objection to the nature of this document, that it is not, in the strict sense of the word, liquid, if the defendant has been personally served and is in default. At the same time it is better in a case like the present to issue a summons in the ordinary form as in illiquid cases and move for judgment in default of appearance.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

In re HORO CONCESSION EXPLO- } 1898.
RATION COMPANY. } June 12th.

Company in liquidation—Preliminary Report under Act 25 of 1892, sections 154 and 155.

Mr. Rose-Innes, Q.C., presented the liquidator's report in the above company which was as follows: The company was placed in voluntary liquidation by an extraordinary resolution of the company under section 178, sub-section 8, of the Companies Act of 1892, and Mr. Richard Shaw was appointed liquidator. The nominal capital of the company at the date of its formation on the 16th November, 1886, was £100,000 in 100,000 shares of £1 sterling, which were all issued as fully paid up to the vendors of the Horo Concession in consideration of the transfer of the concession to the company, the vendors also providing the sum of £3,000 for the working expenses and other purposes of the company. On the 3rd December, 1889, the capital was by resolution of the company increased to

the sum of £200,000 by the creation of 100,000 new shares of £1 each, fully paid up under the provisions of Act 18 of 1888. Of these new shares 50,000 were subscribed for and issued at the sum of £1 sterling each. The nominal capital of the company at the date of the liquidation was therefore £200,000 of which £150,000 in £1 fully paid-up shares was subscribed and issued. The assets consist of a concession of 400 square miles of country situate in the N.W. corner of Swaziland granted by the late King of the Swazi nation in the first instance to Frank McLachlan and Daniel Burton Scott, and by them ceded to this company, together with buildings, machinery, and mining plant erected by the company on the property, and a liquor concession also granted by the late King of the Swazi nation to S. A. Simpkins and by him ceded to the company. The cash balance in hand at the date of the liquidation at the several offices and agency amounted to £528 16s. 11d. It is impossible to estimate the market value of the assets with any degree of accuracy. An offer of £13,500 upon certain conditions has been made for them, which will be submitted for consideration at a meeting which has been convened for that purpose. The liabilities at the date of the liquidation amounted approximately to the sum of £12,266 15s. 2d. The company's liquidation became necessary in consequence of its inability to meet these engagements or to continue its operations. The failure of the company has been caused by the heavy expenditure incurred in prospecting the property and developing the mines, erecting buildings and machinery, and the poor results obtained from the mining and milling operations of the company. All the facts relating to the history and transactions of the company have been from time to time clearly set forth in the reports and accounts which have been presented to the shareholders at the several annual meetings, and in the opinion of the liquidator no further inquiry is desirable or necessary as to any matter relating to the promotion, formation, or failure of the company or the conduct of the business thereof.

Mr. Rose-Innes, Q.C., pointed out that no provision was made under the Act for publication or inspection of the report.

The Chief Justice said there was nothing in this report which would require to be brought to the notice of the shareholders, as the liquidator did not propose to take any further steps in the matter. The Court would accept the report in the present case, reserving to itself in future cases, if it should deem it necessary, to require the publication of the report, or at all events a notice that the report should lie open for inspection.

The report was accordingly filed by order of Court.

[Attorneys, Messrs. Scanlen & Syfret.]

STEYN'S TRUSTEE V. STEYN. } 1893.
AUCAMP V. STEYN'S TRUSTEE } June 12th.
AND STEYN.

Insolvency—Proof of debt—Application to expunge.

The first of these applications was made by the trustee against the insolvent's wife for an order expunging a proof of an alleged debt to the extent of £241, filed on behalf of the respondent in the insolvent estate of the said Steyn, on the ground that the claim was not a *bona-fide* one.

The second application was made on behalf of a creditor for an order requiring the trustee of the insolvent estate of Steyn to admit the proof of debt filed by applicant at the third meeting of creditors, but rejected at the instance of the insolvent and his wife.

On the consent of counsel, both applications were taken together.

Mr. Rose-Innes, Q.C., appeared for the trustee, and Mr. Searle for the first-named respondent and for the second applicant.

Mrs. Steyn's claim was made up of the following items: Cato Lemue, £55; M. D. Coetzee, £25; C. D. Aucamp, £47; J. H. Coetzee, £22; A. M. Raubenheimer, £82; 100 lambs, £60; moneys alleged to have been paid and advanced by her on behalf of her husband. The proof was admitted by the Resident Magistrate. The trustee objected on the grounds that the claim was not *bona-fide*, and alleged that Mrs. Steyn had only advanced £21 15s. to creditors and not £79 (as per items 2, 4 and 5 above). He also objected to the items £55 and £60 and alleged that the £47 had not been paid to Aucamp. Aucamp's claim was on a promissory note for £47, which Mrs. Steyn alleged had been paid by the applicant's taking over a young horse in discharge of his claim. Aucamp denied that he had been paid but the Magistrate rejected his proof.

Counsel having been heard on the affidavits,

The Court ordered Aucamp's proof of debt to be admitted with costs. Mrs. Steyn to be allowed to prove for £55 and £21 5s., and to pay costs.

No further proofs to be allowed.

[Applicant's Attorney, G. Montgomery Walker; Respondent's Attorney, J. W. Sauer.]

UNION BANK V. VOS. } 1898.
 } June 12th.

Bank Director—Branch of Trust—Winding-up Act, 1868—Application under the 47th section.

This was an application for an order requiring the respondent to pay to the liquidators

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of the Union Bank, under the provisions of section 74 of the Winding-up Act of 1868, the sum of £800,000 by way of compensation in respect of breaches of trust committed by the respondent as one of the directors of such bank.

Mr. Rose-Innes, Q.C., appeared for the liquidators, and Mr. Juta and Mr. Searle for the respondent.

The following is the liquidators' petition:

1st. That in the year 1847 a Joint Stock Banking Company styled the Union Bank, and hereinafter called "the Bank," was formed and thereafter carried on business in Cape Town and was thereafter a bank of issue within the meaning of Act 19 of 1865.

2nd. In accordance with the provisions of its Deed of Settlement the Bank was continued from time to time until the month of June, 1882, and in January, 1882, the shareholders of the Bank in accordance with Article 50 of the said deed duly resolved to continue the said bank for a further period of fourteen years from the 1st June, 1882, and the Bank was continued accordingly.

3rd. The original subscribed capital of the Bank was £150,000 in 15,000 shares of £10 each. The called-up capital originally amounted to £75,000, being one half of the subscribed capital or £5 per share.

4th. In the year 1886 the directors of the Bank, owing to heavy losses incurred, resolved to call in the balance of the subscribed capital amounting to £5 per share, and the call was accordingly made. On account, however, of the inability of a number of the shareholders to pay their calls, the amount received on account of the call was only some £36,000 or thereabouts.

5th. According to the statement laid before the shareholders at their general meeting held in January, 1889, the capital of the Bank then amounted to the sum of £36,800 with a contingent fund of £587 17s. 6d. There was no reserve fund.

6th. Before and during the years 1889 and 1890, the respondent was a director of the Bank duly elected, and he duly accepted and continued to hold office as such director and became and was bound to discharge his duties and trusts as such director in accordance with law and the provisions of the Deed of Settlement aforesaid, to the terms of which the applicants crave leave to refer this Honourable Court.

7th. By Article 50 of the Deed of Settlement it is provided *inter alia* "That if at any time the losses of the said Bank shall have exhausted all the surplus fund and also one half of the paid-up capital then the directors shall forthwith call a special general meeting of the proprietors in manner provided by the 46th section of this Deed and shall submit to such meeting a full and general statement of the affairs and concerns of the said Bank, and thereupon the said Bank shall be dissolved, unless a

majority of the proprietors present shall resolve by their votes to continue and carry on the said Bank, and shall then and there undertake in writing to indemnify the dissentient proprietors against all the existing debts and engagements of the said Bank, and to purchase the shares of such dissentient proprietors at such amount in respect of every such share, as shall be determined by the arbitrament and award, to be made in writing within such period as shall by the proprietors present be fixed, of two indifferent persons, whereof one shall be chosen by the proprietors who shall have resolved to continue and carry on the said Bank, and the other by the dissentient proprietors. Provided that should such persons so chosen not agree upon their arbitrament and award they shall appoint any other indifferent person to be umpire in the determination to be made concerning the premises, and whose award or umpirage shall be conclusive upon all and each of the proprietors.

8th. In or about the year 1888 the directors of the said Bank discounted bills and promissory notes against the security of gold scrip to a very large amount, and one of the chief customers of the said Bank was one W. A. Lippert, carrying on business under the style or firm of W. A. Lippert & Co.

9th. In order to obtain money to make these advances the directors in or about the year 1889 commenced to re-discount with the Standard Bank bills so discounted by them, and pledged the assets of the said Bank to the Standard Bank as security therefor.

10th. On or about the 18th day of April, 1889, at a special meeting of the directors at which the said respondent was present, the cashier of the said Bank informed the directors that he had advanced to the said firm of W. A. Lippert & Co., a sum of about £180,000 on his own responsibility, and without the knowledge or sanction of the Board of Directors, and that the said firm of W. A. Lippert & Co. required still further assistance. It also transpired at the said meeting that the cashier had issued letters of credit in favour of the said firm to the amount of about £80,000, for which the Bank was responsible.

11th. On or about the day following, to wit the 19th day of April, 1889, the chairman of the Board of Directors of the said Bank and certain of the directors met the said W. A. Lippert in the Bank premises when his account with the Bank was gone into, and the position of affairs ascertained to be that the total liability of the said firm to the Bank on that day, including the unauthorised advances made by the cashier, amounted to a sum of £297,880 10s. 8d. Your petitioners are unable to ascertain from the records of the Bank whether the respondent was present at this meeting, but they are informed and believe that if he was not then present he was present at a subsequent meeting held the next day,

when the matter hereinbefore referred to was again fully gone into and discussed.

12th. A statement showing the liabilities of the said firm, and the value of the securities held on account thereof, was prepared by the chairman of the Board of Directors at the said meeting, from which it was ascertained that the estimated loss on that account alone at that date was £71,000 and that the said firm required fresh advances to, the amount of £87,000 on scrip then valued at £60,000 leaving a further estimated deficiency of £27,000. (A copy of this statement was annexed.)

13th. As far as your petitioners have been able to discover, after carefully considering the matter, the losses the Bank would have sustained on other accounts, if it had been liquidated with reasonable care at that date, would not have amounted to more than £10,000 or thereabouts, thus making a gross loss for which the contributories would have been liable of £80,000 or thereabouts.

14th. According to the statement published by the said directors in July, 1889, the capital of the said Bank at that date amounted to £86,880, with a reserve fund of £7,560 and a contingent fund of £587 17s. 6d.

15th. Your petitioners submit that it was the duty of the respondent and of the other directors on ascertaining in April, 1889, that the losses of the Bank had exhausted all the surplus or reserve fund, and far more than the paid-up capital of the Bank, to have forthwith called a special general meeting of the proprietors in terms of Article 50 of the Deed of Settlement that the Bank might be dissolved, unless a majority of the proprietors present should by their votes resolve to continue and carry on the said Bank and to indemnify dissentient proprietors as aforesaid.

16th. The respondent, in breach of his duty as a director and acting wrongfully and unlawfully in concert with the other directors of the Bank, did not call such meeting as aforesaid, but then and thereafter continued wrongfully and unlawfully to conceal from the proprietors the true position of the affairs of the said Bank, and wrongfully and unlawfully continued and extended the business of the said Bank, whereby after the month of April, 1889, and before the Bank was placed under a Winding-up Order as hereinafter set forth, the losses of the Bank were increased by an amount of £800,000 and upwards.

17th. In proof of the allegations in the foregoing paragraph your petitioners find that the liabilities of the said firm of Lippert & Co. at the date of the Winding-up Order before referred to had increased to £564,455 13s. 10d. with securities for same valued at £149,802 8s. leaving a deficiency of £405,158 5s. 10d. This deficiency was not materially reduced on the securities being valued notwithstanding that they were realised to

the best advantage and with due care by your petitioners.

After the month of April, 1889, and up to the date of the Winding-up Order before referred to, further and other losses were made by the said directors the amounts of which your petitioners do not consider it necessary more fully to particularise for the purposes of this application in view of those hereinbefore set forth.

19th. Your petitioners further submit that the respondent in breach of his duty and trust, as a director and in conjunction with his co-directors, moreover falsely represented the position of the affairs of the Bank in reports and statements presented to the annual general meeting of proprietors in January, 1890, and the statement of account presented therewith, and also in the statements published after April, 1889, in compliance with the law, to wit, the Act No. 19 of 1846, setting forth the assets and liabilities of the Bank inasmuch as the reserve fund therein brought up was not in existence, and the amount of notes and bills under discount was incorrectly stated, as large amounts of bills and notes rediscounted with the Standard Bank were not included therein.

As far as your petitioners have been able to ascertain from the books of the Bank, the true amount of bills under discount on the 30th June, 1889, 31st December, 1889, and 30th June, 1890, was as follows:

30th June, 1889—Bills and notes under discount and advances on bonds and other securities as shown in published statements	£877,162	9	1
Actual amount of bills under discount, including bills rediscounted with the Standard Bank and not brought up ...	679,222	9	5
31st Dec., 1889—Bills and notes under discount and advances on bonds, &c. (as above) ...	517,688	1	8
Actual amount of bills, &c., under discount as above ...	761,885	9	8
30th June, 1890—Bills and notes under discount, and advances on bonds, &c. (as above) ...	591,577	8	11
Actual amount as above ...	888,840	0	0

20th. In the report and statement and other statements hereinbefore referred to, the respondent, in conjunction with his other directors and in breach of his duty and trust as a director, wrongfully, unlawfully and falsely represented *inter alia* that the business of the Bank had realised actual profits out of which dividends were available for proprietors, whereas in truth and fact, as the respondent well knew, the business of the said Bank was carried on at a heavy loss

during the years 1889 and 1890; no profits were available for dividends in terms of the Deed of Settlement, and the said Bank was heavily indebted to the Standard Bank on bills rediscounted with that institution bearing the signature of the said firm of W. A. Lippert & Co. and others, which bills were only partially covered by collateral security, all of which the respondent and his co-directors wrongfully and unlawfully concealed from the proprietors of the said Bank. In proof of the allegations hereinbefore set forth your petitioners say that at the date of the Winding-up Order hereinbefore referred to, the said firm of Lippert & Co. owed the said Bank no less than £70,000 or thereabouts for discount and commission and which amount had been treated as profits earned, and that on the half-years ending the 30th of June, 1889, 31st Dec., 1889, and 30th June, 1890, bills and notes to the respective sums of £302,070 0s. 4d., £248,879 8s. and £246,762 16s. 1d, rediscounted with the Standard Bank and for which the assets of the said Bank were pledged to the Standard Bank, were not brought up in the published statements of the liabilities and assets of the said Bank, nor in any way referred to in the said reports and statements (copies of the reports and statements and of extracts from the minutes and secret minutes were annexed).

21st. That in addition to the losses hereinbefore referred to, other and further losses were made by the said Bank after the month of April, 1889, and before the Bank was placed under a Winding-up Order as hereinbefore set forth, which losses your petitioners do not deem it necessary to further particularise for the purpose of this application in view of the amount of those already set forth.

22nd. In the months of January and February, 1890, the respondent wrongfully and unlawfully and in breach of his trust as a director, and taking improper advantage of his knowledge as a director, of the matters hereinbefore referred to, sold and procured transfer to be passed from him of 270 out of 800 shares heretofore held by him in the said Bank, the buyers or transferees of the said shares being thereafter unable to meet in full the calls made in respect of the said shares amounting to £49,950 of which amount the sum of £12,909 4s. 2d. has only been recovered with securities still unrealised estimated to be of the value of £764 18s. 6d.

23rd. In the month of July, 1890, the Bank was placed under a Winding-up Order by this Honourable Court, and your petitioners were thereafter appointed the official liquidators thereof by your Honourable Court.

24th. By reason of the breaches of duty and trust on the part of the respondent as a director which are hereinbefore set forth the contribu-

tories of the said Bank have suffered damages in the sum of £800,000.

Wherefore your petitioners pray that it may please your Honourable Court to grant them an order under the provisions of section 47 of Act 12 of 1868 to compel the respondent to pay to them the said sum of £800,000 as aforesaid, by way of compensation in respect of the breaches of trust committed by the respondent as hereinbefore set forth, together with the costs of this application, or that your petitioners may have such other and further relief as to your Honourable Court may seem meet.

G. W. STEYTLER,
HY. GIBSON.

Dated at Cape Town this 26th day of May, 1898.

Mr. Searle read the respondent's affidavit, which set forth that in 1888 the Union Bank discounted bills and promissory notes against security of gold scrip to a large amount, and that W. A. Lippert was one of the chief customers of the bank. Respondent considered at the time that these transactions, although fully secured, were too large, and he repeatedly objected to the increase, having from time to time urged that Lippert's account should be reduced. The majority of the co-directors, however, took a different view, and at his request the chairman was deputed in January or February, 1889, to see Lippert about the matter. He did so, and reported the result of his interview, from which it appeared that Lippert was a wealthy man. Respondent denied that prior to April, 1889, the directors rediscounted with the Standard Bank bills discounted with them, or pledged the assets of the bank as security. He admitted that prior to April, 1889, the manager did the acts alleged, but in considering the position of Lippert and the bank, the directors were of opinion that there was no loss, and that no loss would accrue to the bank. He further denied that in April, 1889, the bank had lost its capital or any portion thereof, and he denied that it was the duty of the directors in April, 1889, to call a special meeting of shareholders in terms of the 50th section of the deed of settlement. No losses had then been sustained in connection with Lippert's account, though the value of his securities had declined, but they had every reason to believe, and did believe, that the shares would rise considerably in value, and that the depression was only temporary. As a matter of fact, the shares did rise considerably between April and August, 1889. He also denied that the directors wrongfully and unlawfully concealed from the shareholders the true position of the affairs of the bank, or that in consequence of the action of the directors the losses of the bank were increased as stated. Respondent further alleged that in January, 1890, the reserve fund was in existence,

and with regard to the bills rediscounted with the Standard Bank, he was informed and believed that it was not the practice of banks to show rediscounted bills in their statements of assets and liabilities. He denied the statement that the directors represented that they declared dividends when no profits had been made, and he alleged that profits were earned, as shown in the statement. Further, he alleged that when the statement was made the directors were fully justified in believing that the assets of the bank brought up in that statement were good. He denied that he took unlawful advantage of the knowledge acquired by him as a director of the bank's affairs to sell 270 out of 800 shares, and he denied that any loss accrued to the bank by reason of having sold the shares. On the contrary, the bank actually gained thereby, because the purchasers, although they did not pay the calls in full, paid considerably more than he could have done. He denied that he ever committed any breach of trust as a director which would entitle applicants to recover any money from him, and lastly, he alleged that his conduct as a director was *bona fide*, and whatever was done was in full belief that he was acting in the interests of the bank, and he had never obtained any discounting or other facilities from the bank.

The affidavit of Mr. J. R. Ross, chairman of the Union Bank, was also read, and after corroborating respondent, it set forth that he (Mr. Ross) in January, 1889, interviewed Mr. Lippert. Lippert told him that he was worth £150,000. He saw a large quantity of scrip and Lippert's books, and was satisfied that his statements were correct. Nothing further occurred until 1889, when the directors became aware of certain unauthorised advances made by the cashier to Lippert, which the directors took into consideration. He denied that in April, 1889, the directors rediscounted with the Standard Bank bills discounted by them, or pledged the assets of the bank as security. After the acts of the cashier, the directors considered Lippert's position, and came to the conclusion that there was no loss, and no loss would accrue to the bank. He also denied that in 1889 the Union Bank had lost half its capital. No losses had then been sustained in connection with Lippert's account. He admitted that he framed a certain statement, and alleged that if Lippert's securities had been realised then there would have been a deficiency of £70,000, according to the statement, but the statement was framed hurriedly, and with the object of showing the position of the bank in its worst light, and that some of the securities were undervalued and others omitted. Secondly, he alleged that the directors were justified in believing that the share market had only temporarily fallen in value, and as a

matter of fact the value of Lippert's securities increased between April and August, 1889. The remarks made in the case of the "Union Bank v. Moller" fully justified the directors in acting as they did, and in order to show that the matter was thoroughly considered, a newspaper report of the case was posted in the minute-book. As to the reasonableness of the course adopted by the directors, he personally consulted the manager of the Standard Bank, who advised that they would do well to continue to support Lippert. It was the general opinion of those best qualified to judge that the depression in the gold share market was only temporary. He further denied that the directors concealed the true position of the affairs of the bank, or that in consequence of their action the losses were increased. With regard to the bills rediscounted with the Standard Bank, he alleged that it was not the practice of banks to show them in their statements, nor did he see how it could be done, for such bills were not legal assets of the bank. In conclusion, he denied that the directors declared dividends out of profits when none had been made, and alleged that when they declared dividends they were justified in believing that the assets were good, and it must be remembered that the securities the bank held were not all they had to look to for payment of bills discounted.

The affidavit of Charles Lewis was also read to the Court, and in substance he denied that the directors wilfully concealed from the shareholders the true position of the affairs of the bank, believing as he did that it was not the practice in bank statements to show rediscounted bills. The report and statement referred to were framed with that understanding, clearly and distinctly affirmed at the Board meeting, which was supported by the opinion of experts, and quoted at the meeting.

The affidavit of Patrick Cameron Grant, accountant, who had examined the books of the bank, set forth that on the 1st February, 1889, the bank held securities to the value of £868,508 9s. 9d. against an indebtedness of £291,216 15s. 4d. On the 18th April, 1889, the securities had fallen in value to £244,201 8s. 8d., but on the 17th August of the same year the value had risen to £280,249 9s. 9d. He specially looked into Lippert's account as it stood on the 18th April, 1889, with the statement passed by the chairman, which showed a deficiency of £70,000. He found that some of Lippert's securities had been undervalued, and that others had been omitted altogether. The actual difference between the amount owing by Lippert and the value of his securities was £47,000 instead of £70,000, while in August, 1889, the difference, owing to the rise in shares, was not quite £11,000. The general opinion of brokers and others best qualified to judge was that in April, 1889, there was a depression in the gold share

market, but it was only temporary, and that the shares would soon rise again.

The answering affidavit of Harry Gibson was next read by Mr. Innes. Witness said it was difficult to trace with any degree of accuracy from the books the actual amount of bills rediscounted from time to time, owing to the directors not having caused a recurrence account to be kept as should have been done. He had, however, received permission from the manager of the Standard Bank to inspect the account of the Union Bank with that institution, kept in the books thereof, and had ascertained that bills were rediscounted during the years 1885, 1886, 1888, and 1889, and that the largest amount standing to the debit of the Union Bank at any one time was during those years, which was as follows: 1885, £5,000; 1886, £7,500; 1888, £86,000; and 1889 (January), £106,000. There was no redistribution in the year 1887. With regard to the affidavit as to the obligation of the directors to show in their published statements the bills rediscounted by them upon which the bank was liable, he would crave leave to refer the Court to section 2 of Act No. 19 of 1865. He had also perused the affidavit of Patrick Cameron Grant, and he said that Mr. Grant, in making his estimate of the loss on the securities therein referred to, appeared to have lost sight of Lippert's bills and their rediscounting by the directors with the Standard Bank. Those bills amounted on the 18th April and 17th August, 1889, to the sum of about £141,000, of which sum about £60,000 represented trade bills, and the balance of £81,000 or thereabouts represented bills secured by scrip of various gold-mining and other companies, which if realised on either of the dates before mentioned would have materially increased the loss estimated by Mr. Grant, as a portion of the scrip attached to the said bills was of a very inferior character.

Counsel having been heard on the affidavits,

The Chief Justice said it was quite clear from this discussion that it was impossible for the Court to do justice between the parties upon the affidavits as they stood. The applicants would file a declaration in the ordinary course, and the case would have to be tried as an ordinary trial, the petition to stand as the summons. In the meanwhile it would be well worth the consideration, of all parties concerned whether it would not be advisable that a lump sum should be paid by respondent and accepted by applicants in satisfaction of all claims against him. Costs would be costs in the cause.

[Applicants' Attorneys, Messrs. Fairbridge & Arderne; Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

REYNDERS V. REYNDERS.

On the motion of Mr. Barber, the return day of the rule in this case was extended to 12th July.

REGINA V. JAMES HENRY MOORE. { 1898.
June 12th.

This was an appeal from the conviction of the accused before the Resident Magistrate of Barkly East on a charge of contravening the Scab Act of 1886 by neglecting to make proper and diligent efforts to cleanse certain sheep and goats.

Mr. Juta, for appellant, said the facts were the same as in the case of *Regina v. Theron* in which their lordships had quashed the conviction a few days ago.

Mr. Giddy, for the Crown, agreed that it was so, and the Court quashed the conviction accordingly.

SAMUELS V. SAMUELS.

Mr. Graham, on behalf of petitioner, applied to have the rule made absolute admitting applicant to sue *in forma pauperis* in an action against her husband for divorce.

The Court made the rule absolute, and appointed Mr. Graham to act as counsel.

Ex-parte PRINS. { 1898.
June 12th.

Will—Landed property—Entail—Mortgage authorised to discharge debts owing by the estate.

Mr. Searle presented the petition of Jacob Prins in his capacity as executor testamentary in the estate of the late Regina Coerse and surviving husband, Goliath Prins, of Matjeerivier, in the division of Oudtshoorn.

It appeared from the petition that by the last will and testament of the late Regina Coerse and surviving husband, Goliath Prins, under which the petitioner held his appointment as executor testamentary, certain landed property situate in the division of Oudtshoorn was specially bequeathed to the three children of the testators (one of whom was the petitioner), subject to the condition that none of the children were to have the right to sell or pawn their share of the ground, but that the same should fall to their children after their death to the third generation. The survivor was to have a life interest in the property, but in the event of his or her remarriage, possession of the land was to be given to the children. The survivor filed an act of repudiation of the joint will of himself and his deceased spouse. The estate was indebted to the extent of

several hundred pounds and beyond the landed property specially bequeathed there were no assets to satisfy the debts. The petitioner alleged that it would therefore be necessary to dispose of the landed property and with the proceeds to satisfy the claims of the creditors, one of whom was a bond-holder. The petitioner formally came to the Court to sanction the sale inasmuch as by the terms of the bequest the property was entailed and intended to revert to the grandchildren of the testators, all of whom were minors at the date of the petition. The petitioner further craved the direction of the Court when treating with the half of the balance of the proceeds (after satisfying the debts) that would represent the estate of the deceased, and asked the Court's sanction to distribute such balance amongst the heirs *ab intestato*. The petitioner made this application on the grounds that it would be extremely difficult, if not impossible, to deal with the same subject to the limitations attaching to the bequest of the land. Wherefore he prayed for an order, (a) For leave to sell the landed property by public auction; and (b) for authority to distribute the net half of the proceeds of the landed property amongst the heirs *ab intestato*.

The Court authorised the raising of a loan by way of mortgage to pay such debts owing by the estate as might appear to the Master to be due, and also the costs of the application.

[Petitioner's Attorneys, Messrs. Tredgold McIntyre & Bisset.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

CONRADIE V. KLOPPERS. { 1898.
June 18th.

Malicious injury to property—Right of road
—*Bona-fide* assertion of right.

A person who destroys a fence across a road on the property of another in the bona-fide belief that he has a right to the use of such road and for the purpose of asserting such right, cannot be convicted of malicious injury to property.

Where no such right exists and no reasonable ground for belief in its existence the mere fact that the injury to property was done upon legal advice is not sufficient to disprove malice.

This was an appeal from a conviction of the appellant by the Resident Magistrate for Worcester.

The accused, a farmer residing on the farm Nonna, was charged on two summonses, the first with the crime of malicious injury to property, in that he did on or about the 8th day of May, 1898, and at Phillipusdal, in the district of Worcester, wrongfully, unlawfully, and maliciously cut several strands (six wires) of a fence belonging to Jacobus Stephanus Kloppers and Brothers, and the second with contravening Act 27 of 1882, section 7 (12), in that he did on or about the 8th May, 1898, and at Phillipusdal, in the district of Worcester, wilfully trespass on and refuse to leave the said farm Phillipusdal, after being warned by the owner, Jacobus Stephanus Kloppers.

The accused pleaded not guilty to both charges.

It was agreed to take the evidence together in both cases.

The complainant, Jacobus Stephanus Kloppers, gave the following evidence: I am a farmer residing at Phillipusdal, in this district, and I have charge and control of the said farm. The accused is a farmer residing on the farm Nonna, adjoining mine. He is in the habit of using a certain road to his homestead over our farm. This road for a long portion of the way is close to the boundary, and accused's ground runs parallel to the road, at a distance of about 20 or 30 yards from it. I have known these farms for the last thirty years. Both of them belonged to an uncle of mine. It is now about twenty years since

Nonna was sold to Brand, who remained on it until the accused bought it about twelve years ago. In Brand's time he used the road running over the ground of one Du Toit into the Robertson main road. There was another road over Nonna, which joined the main road to Worcester. There was then no such road as that used lately by the accused. Separating our grounds there is a wire fence, which was put up by the accused, but it is not on the proper boundary. On the accused's side of the fence is a piece of ground, which is in dispute. A short time ago I gave the accused notice that I was about to erect a wire fence across the road on my farm, and I forbade him to enter my grounds. This was on the 19th April last. I also made an opening in the fence between our respective grounds, and made a road on the accused's side of the fence leading in the direction of his house upon the piece of ground in dispute. The road I made was such as anyone could use. On the evening of the 8th May last the accused arrived at the fence. He was travelling in a cart homeward. He requested me to open the fence, I happened to be near it at the time. I replied, "If I wanted it open I would not have closed it. I have made another road for you." The accused himself cut the strands of the fence. He cut six strands, the fence was composed of six strands. After this he proceeded in his cart through the opening. The accused before he cut the fence was on that side of the wire fence on which the gate entering upon the new road was, and had he been so disposed, he could easily have taken that road. I put a gate in the opening of the fence mentioned before. In the plan now put in the road in question and the new road made are shown, also the wire fencing and the points where the road was closed up by me, and the other road opened (plan put in). Owing to the cutting of the strands the entire length of the wire fencing was slackened, and the wires drawn out of their position. I have suffered great damage by the strands having been cut, and it will take me a considerable time to replace the wire in position. All this trouble could have been avoided if the accused had merely turned down the road that had been made. I charge the accused with malicious injury to my property. I saw the accused cut the wire, he appeared to use a strong pair of pliers. At the time accused asked me to open the fence, before he cut it, I showed him the gateway and the new road. He said if I did not open the wire fencing he would do so, and immediately cut it.

Cross-examined: If the Court permits me I intend to put up the fence again. (I mean the Magistrate's Court.) My brothers along with me have had Phillipusdal for six or seven years, and the accused has had Nonna for about double that time. I blocked up the road on the same day

on which the fence was afterwards cut down. There has been a correspondence between my agent and the attorney representing the accused about the boundary line. I authorised my agent to write certain letters to the attorney representing the accused about the boundary in dispute and about the road in question. The accused claims the right to use the road. He said so to me himself. I dispute his right. He did not tell me how he got this road. Nonna is not a portion of Phillipusdal, but it formerly belonged to the same owner. The accused could have gone right through along the new road after he had passed the point G on plan. It was shortly after sunset when the accused cut the strands. My homestead is about 1,000 yards from that spot. I was still busy in that neighbourhood when I saw accused's cart stop. I happened to have witnesses at the time. I did not have them there ready.

Several other witnesses were called for the complainant, who testified as to the cutting of the wire and as to the damage done, which was estimated at £20 or £30.

The accused gave the following evidence: I have a right to the road which the complainant shut up on the 8th May. It is now about fifteen years since I became the owner of Nonna. The road now in question is not the same as it was when I bought Nonna. Hans Kloppe sold the place Phillipusdal to Paul Burger, and the road which I used then went over his wurf. Paul Burger asked me instead of using that road to take one along the boundary, which I did, and this is the road which the complainant forbids me to use. I have used that road for twelve or thirteen years.

From other evidence led for the defence it appeared that the accused had been advised by his attorney to remove any obstruction which he might find in the road in dispute.

The attorney for the accused applied for a dismissal of the case on the ground that the Court had no jurisdiction, there being a dispute between the parties as to the right to the road and title to the land. This application was refused.

The accused was found guilty of malicious injury and trespassing, and was sentenced to pay a fine of £10 or one week's imprisonment for the offence of malicious injury, no additional punishment being inflicted for the trespass.

The following are the Magistrate's reasons:

The above-mentioned prosecution was brought as two separate charges, and it was agreed to take the evidence as to both at the same time. The accused pleaded "not guilty" in respect of both charges. The complainant proved that he and his brothers were joint owners of the farm Phillipusdal, and the accused the owner of the farm Nonna adjoining it. That accused had been in the habit of using a road passing over the farm and sown lands of Phillipusdal in order to reach the

public road leading to Worcester, that it was highly inconvenient for him (complainant) and the joint owners that the accused should continue to use that road in so far as it passed over their sown lands, and that accordingly on the 19th April last he gave the accused written notice through his agent (Oliff) that he was about to erect a wire fence across the said road at the spot where it enters on the said land, when proceeding from the direction of Phillipusdal's homestead towards "Nonna," viz., at a point marked "B," on the plan (V) which was put in, and that he forbade him to enter his ground at that spot after that. The complainant showed further that close to the point "B" he made at the same time an opening in his existing wire fence to serve as an exit for the accused, while up to there the road remained on his ground, and that he also constructed a road from the point "G" only a few yards from "B," leading towards the accused's dwelling and designedly made for his use. This road passed lengthways over a strip of ground about which the most that can be said is that it was a piece of land in dispute between the parties, if indeed the dispute had not been put an end to in favour of the complainant by the document (W) put in at the hearing. As it was alleged at the hearing that there was also a dispute between the parties as to the road over Phillipusdal used by the accused heretofore, I allowed evidence to be led with the view of ascertaining whether there existed any *bona-fide* claim to a right of road on the part of the accused, but I am of opinion that the evidence altogether failed to establish this. The accused himself in his evidence only stated that he had made use of that road since the former owner of Phillipusdal permitted him to do so some twelve or thirteen years ago in lieu of another road which he had been using since he became owner of "Nonna" but even he did not allege that he had any prescriptive right to either road while the bulk of evidence taken was in favour of the view that the former owner of "Nonna" had used only two roads, one passing over Du Toit's farm and joining the Robertson main road, and the other passing over the original "Nonna," and joining the Worcester public; and the further fact proved by the witness Paul Kloppe that "Nonna" (the accused's farm) was not built on until eighteen years ago. When Brand bought it, would afford strong presumption that the former owner used no road over Phillipusdal. When therefore the accused in his evidence denied the fact deposed to by several witnesses that there was a road from his farm over the original farm "Nonna" his other evidence also appeared to be unreliable. In any case it appeared to me sufficiently proved that the complainant, in closing the road in question, acted with consideration towards the accused when he opened a

new road through his wire fencing, as good and short as the old one, for the accused's particular use; that after the notice given of such closing of the road the accused was rightly and properly regarded as a trespasser, when he persisted in using the same, and that his action, in cutting the wire fencing placed across the same, causing considerable damage to the complainant, was most wilful and wanton, and amounted to malicious injury to property.

The defendant now appealed.

Mr. Rose-Innes, Q.C., was heard in support of the appeal. He contended that to justify a conviction for malicious injury to property two essentials must be present—the injury done, and the *mens rea* on the part of the person doing the injury. In the present case, if the appellant, although he had no legal right, believed *bona fide* that he had, and in that belief had inflicted the injury complained of, his conviction for malicious injury to property was wrong. He thought rightly or wrongly that he had a right to the road in dispute, and the injury was done in asserting that right. Again he had acted upon the advice of his attorney, and this was strong presumption of his want of malice. Whatever his civil liability might be, he should not have been found guilty of a criminal offence. The evidence as to malice was not conclusive, and the accused should have had the benefit of the doubt.

Mr. Molteno, for respondent: The accused had no reasonable grounds for assuming that he had any right to the road. His claim was neither based upon grant nor upon prescription. The maxim *ignorantia juris neminem excusat* applied. He cited *Visagie v. Booyse* (Buch. 1869, p. 317).

Mr. Rose-Innes, Q.C., replied.

The Chief Justice said: It is clear that the appellant had no right of way over the complainant's property. He had no right by prescription, or by agreement or by grant. The appellant destroyed the fence which had been put up by the complainant across the road in question, the result being that the wires were loosened for a long distance and considerable damage done to the complainant. I quite agree with Mr. Innes that if the appellant did the act complained of in the *bona fide* belief that he had a right to the use of the road and for the purpose of asserting that right, he ought not to have been convicted of malicious injury to property. This point was in the Magistrate's mind when he tried the case, and he came to the definite conclusion that the act was a wanton and malicious one, and that the appellant had no reasonable ground for his alleged belief that the right of road existed. Looking at the case from every point of view, I am of opinion that there is sufficient evidence to warrant the Magistrate's decision. Not only had the appellant

no right of way but the complainant was quite willing to give him the use of another road which was left open, and which was, to say the least of it equally convenient to the appellant as the one which he unjustifiably insisted upon using. The only circumstance in his favour is that his attorney had advised him to remove any obstruction which the complainant might place across the road. It does not appear upon what information this advice was given, but the advice was certainly wrong, if it implied that the appellant was justified in doing material injury to the complainant's property. There was such an utter want of reasonable ground for the belief that the right of road existed, and such a complete absence of necessity for the destruction, that the appellant ought not to be allowed to shelter himself behind the advice which he received. Such at all events was the Magistrate's opinion, and, as I have said, there is evidence to justify it. The appeal must therefore be dismissed.

Mr. Justice Buchanan concurred, and remarked that had he been sitting as a juror in the first instance, his conclusions would have been the other way, but the Magistrate had drawn his own inference from the facts, and there was sufficient evidence to support it.

Mr. Justice Upington also concurred, and pointed out that it was possible the appellant might have misstated facts so as to mislead his attorney in the advice which he gave.

[Appellant's Attorney, O. C. Silberbauer; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

Ex parte HOFMEYR. { 1898.
June 18th,

On the motion of Mr. Molteno, leave was granted to the petitioner to raise a further loan of £800 on certain properties purchased out of her own money without the assistance or consent of her husband, who is now absent from the Colony, and whose address is unknown to the petitioner.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.O.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.O.M.G.]

Ex-parte NEL. } 1898.
} June 26th.

Ante-nuptial contract—Trustee—Retirement —New appointment.

This was the petition of Marie Theresa Nel, assisted as far as need be by her husband, Daniel Nel, of Oudtshoorn.

It appeared from the petition that the petitioner and her husband were married without community of property. That by clause 6 of their ante-nuptial contract, dated 18th July, 1892, it was provided that the whole of the petitioner's estate, and more especially certain inheritances due to her out of her parents' estates, should remain vested in the trustee under the said contract, to be dealt with after petitioner's death in manner therein provided for. That the contract further provided that in the event of the resignation of his trust by the trustee, the petitioner should apply to the Court to appoint another trustee in his stead. That the trustee resigned, and retired from his position as trustee on the 18th May last. The petitioner prayed that the Court might appoint another trustee. The petitioner further said that her husband was an agriculturist. That the ante-nuptial contract aforesaid gave the trustee the power to invest the amount of the petitioner's inheritance in the purchase of land. That the petitioner and her husband were desirous of having her inheritance so invested, as they would be able to obtain a far greater return than the amount of interest which they at present received. That petitioner and her husband had entered into occupation of a portion of the farm Rust en Vrede, in the division of Oudtshoorn, which had been offered to them for £900, and which they were desirous of purchasing with the funds aforesaid. That the amount of the inheritance due to the petitioner was £689, from which would have to be deducted the costs of the present application, and if the Court sanctioned the purchase of the land, then also the costs of the transfer, transfer duty, and of the bond for the balance of the purchase money. That there would be a balance after defraying the above expenses of about £620 available for the purchase of the said property, leaving a deficiency of £280 to be provided for. That the seller of the property was agreeable to take a "kusting" brief

for the deficiency payable seven years after the date of the passing thereof, to carry interest at the rate of 6 per cent. per annum. To save the expense of another application, the petitioner prayed the Court to be pleased to authorize the trustee, in the event of his deciding to purchase the said property, to mortgage it to the seller for the balance of the purchase price of £900, after payment of the sum of £689, less the costs of the present application, the expenses of transfer, and of the bond and the transfer duty payable in respect of the sale.

Mr. Searle was heard in support of the petition.

The Chief Justice said: As the trust deed contemplated the intervention of the Court, they would appoint Mr. J. A. Foster, of Oudtshoorn, new trustee in the place of Mr. Lind, who had resigned. As to the second part of the petition, no order would be made, as the trustee should be afforded an opportunity of exercising his discretion upon the proposed investment.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bissett.]

Ex-parte CRAIG. } 1898.
} June 26th.

Landed property - Registered in name of person supposed to be dead—Transfer.

This was the petition of Henry John Craig, of Simon's Town.

The petitioner is the executor testamentary of the estate of his late mother, L. I. Craig, who died on 11th February, 1893.

In the year 1864 petitioner's father, married in community to petitioner's mother, went to Australia, and posted a letter from Melbourne on 30th September, 1866, announcing his arrival (the original letter was annexed to the petition), since which date no letter has been received from him; but one Richards, who accompanied him to Australia, wrote to the late L. I. Craig informing her that her husband, James Craig, had been mate on one of the Australian coasters, which foundered with all on board. (This letter was not produced).

The late James Craig possessed certain property at Simon's Town, where his wife resided till her death. She remained in full possession of this property, and bequeathed it to her children, the title to the property being still registered in the name of James Craig. The children have since sold the property for £52, but are unable to give the purchaser title. The petitioner prayed for an order allowing him to pass transfer of the property to the purchaser thereof.

Mr. Molteno was heard in support of the application, and referred to "*Re Julius*" (3 Juta, 108) and "*Ex-parte Storey*" (3 E.D.O., 156).

The Chief Justice said: The estate is a small one, and there is no necessity for incurring further expense. The Court will authorise the petitioner to pass transfer of the property as prayed.

[Applicant's Attorneys, C. & J. Buismanné.]

Ex-parte DREYER. { 1898.
June 20th.

Will—House property—Mortgage authorised for the purpose of executing necessary repairs.

This was the petition of Maria Barendina Dreyer, Johanna Georgina Dreyer, George Casper Dreyer, and Josina Florentina Dreyer, of Newlands.

The petitioners' sister, the late Bessie Cookburn (born Dreyer), died on 25th September last at Badullah in Ceylon, having by her last will and testament given to her three unmarried sisters (above named) the use and enjoyment of her house and land, called Riverside, Newlands, until their marriage or until their decease in case they remain unmarried, and after the marriage or death of all of them she then directed her executors to realise the said property, and to pay the proceeds thereof to the lawful issue of her said three sisters in equal shares and proportions, and in the event of their death without issue she gave and bequeathed the said property to her brother, George Casper Dreyer, or his heirs in case of his death. The petitioner G. O. Dreyer and Mr. Paul de Villiers were appointed executors at the Cape of the said will. Letters of administration were granted to the executors on 10th March last. The petitioners alleged that the house at Newlands was in a very dilapidated condition and in great need of repairs, and that if the said repairs were not effected before the heavy rains came there was danger of the northern wall tumbling down. They further alleged that they had no funds out of which to do the said repairs, and that it might be months before the Ceylon estate of Mrs. Cookburn could be wound up. That from the Ceylon estate they were entitled under the aforesaid will to a share, which was burdened with a *fidei commissum*, and of which they only had the life interest. The petitioners were desirous of raising the sum of £200 to pay for the necessary repairs to the house Riverside, and they prayed for an order giving them leave to raise this sum by way of mortgage on the property Riverside for the aforesaid purposes. The second-named executor refused to be a party to the present application or to sign a consent to the same being made, on the grounds that it was for the heirs to make the application, and not the executors. He expressed his willingness, however, to sign the necessary bond if the Court granted the order. The matter

was referred to the Master, and he pointed out that if the prayer were granted the bond would have to be passed by the executors testamentary of Mrs. Cookburn's estate, and that they were not both parties to the present application.

Mr. Searle was heard in support of the petition.

The Court authorised the executors to pass a bond for £200 as prayed.

[Applicants' Attorney, J. Hamilton Walker.]

LINDENBERG V. LINDENBERG. { 1898.
June 20th.

These motions, the first of which was an application on behalf of the minor Maria D. Lindenberg, to make absolute the rule nisi for an interdict restraining the minor's father from selling or disposing of certain furniture, her property, and for an order that he do pay the costs of the application, and the second for an order requiring the respondent to supply applicant, his wife, with funds to enable her to institute proceedings for a judicial separation *a mensa et thoro*, and for a division of the joint estate, were, on the motion of Mr. Innes, Q.C., to which Mr. Molteno agreed, postponed till the 27th inst., on condition that the interdict already granted in the first matter should continue in the meantime, and that it should extend to the common property of respondent and his wife.

KING BROS. V. MURRAY.

Mr. Graham moved to have the award of the arbitrators in the matters in dispute between the parties made a rule of Court.

Granted.

SWANEPOEL V. BIRK.

Mr. Searle moved, on behalf of defendant, for leave to defend the action *in forma pauperis*.

Referred to counsel.

DORMEHL V. DORMEHL.

Mr. Searle, on behalf of applicant, applied for a rule nisi requiring respondent to show cause why petitioner should not be allowed to sue him *in forma pauperis* in an action for divorce by reason of his alleged adultery.

The Court granted the order, and made the rule returnable on July 12.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

MARSH V. BEVAN.

{ 1898.
June 22nd.

Dramatic copyright—Plays—Assignment—3 and 4 William IV. cap. 15, section 1—5 and 6 Vic., Cap. 45, section 20—"Authenticated copy"—Interdict.

S., the author of certain plays, authorised M. to be his representative in South Africa to use, sublet, or collect fees for all and every play or comedy of his of which he might supply M. with an authenticated copy.

B. advertised "Guiltless," one of S.'s plays, for a certain evening.

M. obtained a rule nisi restraining B. from playing "Guiltless."

On the return day M. was unable to prove to the satisfaction of the Court that "Guiltless" had been copyrighted in England, and failed to produce an authenticated copy of that play.

The rule was discharged with costs.

This was the return day of a rule nisi granted yesterday, and which operated as an interdict, restraining the respondent, or anyone acting under her authority, from performing the drama known as "Guiltless" or "Is She Guiltless," and from performing any of the other dramas or comedies mentioned in the applicant's petition. The facts upon which the rule was granted, are as follows :

The petitioner is a theatrical manager, at present residing in Cape Town, and is the representative in this country to use, sublet, or collect fees for all and every play or comedy of which Arthur Shirley shall supply him with an authenticated copy, as appeared from a letter signed by Arthur Shirley and annexed to the petition.

The petitioner alleged that Arthur Shirley had already supplied him with authenticated copies of several of his plays, and among others, with an authenticated copy of the drama in four acts called "Guiltless" or "Is She Guiltless?" of which Shirley is the author.

That Shirley had copyrighted the said drama in England, the petitioner having satisfied himself of that fact before he left that country.

That the petitioner had given valuable con-

sideration personally for the right granted to him by the said Shirley, and, in addition thereto, was compelled to pay to the said Shirley a royalty for every time that he performed any of the hereinafter-mentioned pieces, to wit: "A Grip of Iron," "Cleopatra," "Is She Guiltless?" or "Guiltless," "The Cross of Honour," "A Lion's Heart," "The Three Acts," and "Married Men."

That Miss Emelie Bevan, the proprietress of a comedy and dramatic company at present performing in the Vaudeville Theatre in Cape Town, had advertised the drama "Guiltless" for this evening (Thursday, 22nd June), as per play-bill (annexed).

That she had no right to play the drama, and that the petitioner had given her notice that he would interdict her from doing so, to which notice the petitioner had received no reply.

The petitioner further alleged that he had not sublet the said drama or any other of Arthur Shirley's plays to the said Emelie Bevan, nor had Shirley done so, and that he (the petitioner) would be seriously injured if the respondent were permitted to play the said drama or any other of Shirley's plays, of which he had the sole use, and which he intended playing in Cape Town and elsewhere in the Colony.

The petitioner therefore prayed for an interdict.

The document upon which the applicant based his right was in the following terms :

"Eccentric Club, 21, Denman-street, Piccadilly, W.,
August 15, 1892.

"My dear Mr. Marsh,—I hereby authorise you to be my representative in South Africa; to use, sublet, or collect fees for all and every play or comedy of mine that I may now or hereafter supply you with an authenticated copy of, as well as to the exclusive use of the picture-posters expressly executed for the same. Any performance hitherto given of my plays in South Africa have been from stolen and imperfect manuscripts.

"(Signed) ARTHUR SHIRLEY."

Mr. Searle appeared for the applicant, and moved that the rule be made absolute.

Mr. Albert Marsh, the applicant, in answer to the Court, stated that he went to Stationers' Hall before leaving London, and satisfied himself that the play "Is She Guiltless?" by Arthur Shirley, had been copyrighted. The manuscript copy of the play was given to him on the voyage out by Mr. H. G. May, who was now playing with the respondent's company, and who had been instructed by Mr. Arthur Shirley to hand the play to him (applicant).

Mr. Sheil appeared for the respondent, and opposed the rule being made absolute on the grounds that there was no evidence before the Court that the play, the performance of which was sought to be interdicted, was protected by copyright. The applicant was not an assignee,

he was a mere agent, and had no rights in respect of any of Shirley's plays of which he had not an authenticated copy. He was unable to produce an authenticated copy of "Is She Guiltless?" consequently he had no rights in respect of this particular play. In the recent case of "Searelle and Gilbert & Sullivan v. Bonamici and Perkins" (19th May, 1898), there was clear evidence before the Court of the copyright and of the assignment to Searelle.

Mr. Searle, in support of the rule, referred to the Act 8 and 4 Wm. IV., cap. 16, sec. 1, to the 5 and 6 Vic., cap. 45, sec. 20, and contended that Shirley's letter of the 15th August, 1892, to the applicant showed that his plays were protected by copyright. That letter was a virtual assignment to the applicant. The manuscript copy of the play produced was authentic, and as this was disputed, May should be called to show that it was not. The contention that it was not authenticated was a pure technicality. The facts were the same as in Searelle's case, and the applicant was entitled to the remedy which he sought. The interdict should be granted.

Counsel mentioned that "Guiltless" had been withdrawn from the bill for this evening.

The Chief Justice, in giving judgment, said: If an applicant comes into Court on behalf of an author to apply for an interdict restraining the performance of any of his works in this country, he must come with proper evidence of his right to the remedy which he seeks. If, in the present case, Mr. Shirley had himself come into Court and proved that his plays were protected by copyright, the Court would have assisted him. The applicant appears on his behalf, but he has produced no proof that the play in question is protected by copyright. The letter produced applies only to those plays of which an authenticated copy has been supplied by Mr. Shirley to the applicant. No authenticated copy of the play signed by Mr. Shirley has been produced. All we know is that the applicant alleges that he received the manuscript from Mr. May, who had been directed by Mr. Shirley to hand it to the applicant. In the letter of the 14th August, 1892, no special reference is made to the play "Guiltless." The words are: "Every play or comedy of mine that I may now or hereafter supply you with an authenticated copy of." For these reasons the applicant cannot succeed. At the same time I am bound to say that if Miss Bevan goes on performing Mr. Shirley's plays she does so at her own risk. The applicant may hereafter receive all requisite powers from Mr. Shirley, and he will then be entitled to full damages if she continues to produce these plays. I think therefore she is wise in withdrawing "Guiltless" for to-night, and she will be equally wise if she refrains from producing any of Mr. Shirley's plays until she has his permission

to do so. The rule must be discharged with costs. Their lordships concurred.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, O. C. Silberbauer.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

HYMAN'S TRUSTEES V. RANDIESS. { 1898.
June 27th

Jurisdiction—Process in aid—Writ of execution—Writ of arrest—8th Rule of Court—Judge of Supreme Court.

A judge of the High Court of Griqualand, sitting at Kimberley, has no jurisdiction to issue, or order the issue of, process of execution upon an unsatisfied judgment of that Court against property situated elsewhere in the Colony than in Griqualand West, even although he purports to act in his capacity as a judge of the Supreme Court.

Orders of the Supreme Court must be made in open Court held in Cape Town.

Writs of arrest under the 8th Rule of Court may be issued by the Registrar of the Supreme Court upon the proper affidavits being filed, but they must be confirmed in the Supreme Court unless the debt sued for has been paid.

The case of Fisscher v. Nielsen (3 Juta, 370) commented upon and explained.

The High Sheriff asked for the direction of the Court with reference to the writ in the above matter, which was addressed to the Sheriff, and was in the following terms:

In the Supreme Court of
the Colony of the Cape
of Good Hope.

Whereas a writ of execution for the High Court of Griqualand at Kimberley, bearing date the 28th June, 1898, has been issued whereby you are commanded that of the goods and chattels of Johan Richardson Randieess, of or near Alicedale, in the district of Alexandria, you caused to be raised the sum of £888 1s. 8d. sterling, which

John Pooley and Francis Joseph Gardiner, both of Kimberley, in their capacity as the trustees to the insolvent estate of William Alfred Hyman, in our High Court of Griqualand West on the 18th day of May, 1898, before the High Court of Griqualand, recovered finally by a sentence of our High Court against the said Johan Richardson Randiess.

And whereas the said writ of execution of the said High Court of Griqualand is ineffectual for attaching the goods and chattels of the said Johan Richardson Randiess in any part of this Colony other than that of Griqualand West, out of which the said High Court hath no jurisdiction, and the process of the Supreme Court of our colony is required in aid of the jurisdiction of our said High Court.

Now, therefore, these are to command you that of the goods and chattels of the said Johan Richardson Randiess you cause to be made the sum of money aforesaid, according to the exigency of the said writ of execution. And have you that money before the Justices of our Supreme Court at Cape Town on the 22nd day of July, 1898, to be rendered to the said John Pooley and Francis Joseph Gardiner in their said capacity.

And have there this writ.

Witness: The Honourable Percival Maitland Laurence, Judge of the Supreme Court of the Cape of Good Hope at Kimberley, this 24th day of June, 1898.

(Signed) P. M. LAURENCE,
Judge of the Supreme Court of the Colony
of the Cape of Good Hope.

The writ was not signed by the Registrar of the Supreme Court. The High Sheriff directed the attention of the Court to Act 89 of 1877, section 16, and to *Fischer v. Nielsen* (8 Juta, 370).

The Chief Justice said: The Charter of Justice directs that "the Supreme Court shall at all times be holden at Cape Town." According to the report of the Sheriff in this case the Judge-President of the High Court of Griqualand, sitting at Kimberley, has purported by signing a writ of execution to issue process of execution upon an unsatisfied judgment of that Court against property situate elsewhere in the Colony than in Griqualand West. Under the 15th section, however, of Act 89 of 1877 such process of execution could only be issued by the Supreme Court. It was quite true that, during vacation, one judge of the Supreme Court could have issued process, but he would have done so in open Court, as directed by the 82nd section of the Charter of Justice, and such Court would have been held in Cape Town, as directed by the 86th section. Moreover, the order for the issue of process would have been given not by means of the Judge's signature to the writ but by means of a direction to the Registrar of the Supreme Court, whose duty it would then be to issue the writ. In every

way, therefore, the writ now in question is informal. Possibly the learned Judge may have been misled by the case of *Fischer v. Nielsen* (8 Juta, 370), but that case, far as it went, has no application to the present case. There a writ of arrest had been signed by the Registrar of the Eastern Districts Court, by order of Sir J. Barry as Judge of the Supreme Court, and an application was made to this Court to confirm the writ. The writ was confirmed, but not on the ground that the learned Judge could hold a sitting of the Supreme Court at Graham's Town. No order of the Supreme Court is required to authorise the issue of a writ of arrest under the 8th Rule of Court. The dictum of Mr. Justice Bell in *Heinemann v. Jenkins* (2 Seale, 18), was opposed to the previous practice for twenty-five years and has not been recognised since. The Court has more than once decided that it is competent for the Registrar, upon the filing of the affidavits required by the 8th Rule of Court, to issue a writ of arrest in the same manner as he would issue an ordinary summons without any affidavit. In order, however, to guard the liberty of the subject the Court has required that a writ of arrest issued from the Registrar's office shall be confirmed by the Court unless the debt sued for has been paid. In the case of *Fischer v. Nielsen* the Registrar would have been justified, upon affidavits produced, in issuing the writ. Accordingly, without deciding that a Judge of the Supreme Court outside Cape Town had authority to issue a writ of arrest having effect throughout the Colony, the Court cured the informality by confirming the writ. The case does not constitute a precedent for the confirmation of similar writs in other cases and it certainly is no authority for the issue by a Judge of the High Court of Griqualand of process which can only be issued by order of the Supreme Court. Applying the rule of the Digest (2,1,20), *extra territorium jus dicenti impune non paratur*, the Court must direct the Sheriff not to give effect to the process now in question.

The Lordship Concurred.

LINDENBERG V. LINDENBERG. { 1898.
June 27th.

These were two motions which stood over from last Tuesday. Mr. Molteno appeared for applicants in both cases; Mr. Innes, Q.C., for respondent. In the first motion application was made on behalf of the minor Maria D. Lindenberg for an order to make absolute the rule nisi for an interdict restraining the minor's father from selling or disposing of certain furniture, her property, and for an order that he do pay the costs of the application. The second application was for an order requiring the respondent to supply applicant (his wife) with funds to enable

her to institute proceedings for a judicial separation *a mens et thoro*, and for a division of the joint estate. Affidavits were read alleging cruelty and neglect on the part of respondent.

Mr. Innes read answering affidavits denying the cruelty. The parties had lived some time at Stellenbosch, which they left in 1892 to start a boarding-house at Sea Point, and the respondent alleged that all the profits which had been made were retained by his wife.

The Chief Justice said: In regard to the application by the wife against her husband, the Court thought £10 would be sufficient to enable her, if so advised, to prosecute her action, but it would be very much better that the parties came to some private arrangement, as they might fritter away all their substance in going to law. The question of costs would stand over. As to the other application, there was not sufficient evidence that the respondent intended to dispose of the property. Mr. Innes, on behalf of the respondent, undertook not to dispose of it, and on this undertaking there would be no order. Costs to stand over.

IN THE MATTER OF THE MINORS HOLM.

Mr. Tredgold asked for authority to the Master to pay out to the mother of the said minors four sums to their credit in the Guardians' Fund as an allowance to enable their education to be completed.

Granted.

ROBERT'S TRUSTEE V. ROBERTS. { 1898.
{ June 27th.

Insolvency—Liquidation and Distribution account—Objection.

An insolvent lodged an objection to certain claims admitted and brought up in the liquidation account of his estate, but took no further steps in the matter.

On motion made by the trustee the Court ordered the confirmation of the account by a given date, failing an application by the insolvent on or before that date.

This was an application upon notice duly served upon the respondent (the insolvent) calling upon him to show cause why he should not be ordered to proceed with such of the objections, lodged by him on the 14th February last, to the liquidation and distribution account filed by his trustee as had not been withdrawn by him, and why he should not be ordered to abandon the same, and why he should not be ordered to pay the costs of the application.

On the 10th February, 1898, the insolvent addressed the following letter to the Master:

To the Master of the Supreme Court,
Cape Town.

Sir,—In the matter of the Liquidation and Distribution account filed in your office in the Insolvent Estate of James Roberts.

I, the above, hereby beg to object to said accounts for the following amongst other reasons:

1. That the distribution account has not been made up in accord with the principle laid down by the Honourable the Supreme Court on the 19th April, 1892, when the preference of £258 18s. 3d., awarded to the Cape of Good Hope Bank was ordered to be withdrawn, viz., that by receiving first £1,200; and afterwards £479 15s. 5d., this latter from the High Sheriff on about 19th June, 1885, arising out of sales of property pledged in a bond of £2,000; upon which said bank claimed a preference of £800, the said bank lost any further preference under that bond in respect of the £479 15s. 5d. which would leave only £320 4s. 7d. as the said bank's preference, if any under said bond, whereas that bank received under the award made in first account £445 8s. 11d., being an excess of preference of £125 4s. 4d.

2. That at the time of the election of my trustee and until 10th October, 1891, I was a prisoner and unable to object and oppose the first account in my estate.

3. I now beg to be allowed to object to, and time to arrange with the several creditors to rectify their proofs, which I believe most will do or otherwise to test the following claims:

(a) I object to the whole claim of £705 8s. 7d. proved by Cape of Good Hope Bank as a security debt.

(b) Also to the whole claim proved by the executors of the late S. Cronwright. I hold written proofs that I owe none of it.

(c) Also to £48 11s. 11d. for rates proved on my estate by the Divisional Council of Albany, the properties upon which those rates were claimed not having been my property nor in my occupation.

(d) Also to the greater part of the claim of the Municipality of Graham's Town for rates wrongly charged.

(e) Also to the greater part of the claim by Wood Bros., said claim being founded on a contingency, it being now impossible its conditions ever can be complied with.

(f) Also to the balance claimed by Estate late J. Ayliff, as that claim was on a bond passed by another person (to said J. Ayliff), the hypothecated property in latter bond has not been excused fully.

(g) Also the claim of the Estate late J. J. H. Stone, which is over twenty-one years old, and has not

only been settled, but was for costs alleged to be due to the estate late H. Roberts by the firm of W. and J. Roberts, which firm has still property.

4. I also object that the landed property, upon which Mr. Pote held a bond of about £300, being handed over to him at his valuation of £50, which not only is not near its value, but would be more satisfactory if sold by public auction as provided in section 98 of Ordinance 6 of 1843, and no notice of its intended sale having been published.

I have the honour to be,

Sir,

Your obedient Servant,

(Signed) JAMES ROBERTS.

10th February, 1893.

Mr. Searle appeared for the applicant and read an affidavit from his clerk, in which he alleged *inter alia* that the insolvent had notified to him that he had withdrawn the objections marked a, c, e, f and g under paragraph 8 of the above letter. Further than having written the above letter the insolvent took no steps in the matter.

The Court ordered that failing an application by the respondent on or before 1st August next the account should be confirmed on that day.†

[Applicants' Attorneys, Messrs. Van Zyl & Buissanée.]

In re SCHOEMAN'S ESTATE. { 1898.
June 27th

Will—Landed property—Heirs—Compromise
—Confirmation by Court.

Mr. Searle applied for an order confirming an agreement entered into by the heirs of the estate in regard to the distribution of the assets, and for an order that the said agreement be attached to the deeds of transfer made in favour of the beneficiaries.

The material facts are these: J. O. Schoeman died on 6th June, 1892. He was married in community of property to his first wife, Maria Magdalena Schoeman (born Schoeman) by whom he had seven children.

His wife, M. M. Schoeman, died in 1878, but prior to her death a joint will dated 7th September, 1847, was executed by herself and her husband. By this will the testator's rights in certain farms were bequeathed to their children, the survivor being obliged to make an inventory of the joint estate.

J. O. Schoeman framed a liquidation and distribution account of the joint estate in March,

1875, which was filed in the Master's Office in April, 1875.

No inventory was filed with the Master, but a document purporting to be an inventory of the joint estate was found amongst J. O. Schoeman's papers.

In 1892, after the liquidation and distribution account had been filed, the heirs being dissatisfied with the said account demanded, over and above the amounts awarded them in the account, a share of certain two farms bequeathed to them under the joint will.

Whereupon certain erven in the township of Oudtshoorn belonging to the joint estate were allotted and transferred to them, an undefined interest in the aforesaid farms appears also to have been given, and a certain portion was measured off and divided amongst them, but no actual survey was made nor transfer passed.

On account of the conflicting statements made by the heirs it was impossible to say what allotments and interests were assigned to them.

Subsequent to the filing of the aforesaid account, J. O. Schoeman married again. He had no children by his second wife with whom he, on 22nd February, 1892, executed a joint will, which will she repudiated by notarial deed dated 26th September, 1892, now filed with the Master.

In consequence of the great dissatisfaction prevailing amongst some of the heirs after Schoeman's death, and also in consequence of the state of confusion in which his affairs were left, it was found impossible to arrive at the several interests belonging to the heirs under the first will, and a meeting was therefore held of the heirs and of those interested in the first joint estate to endeavour to ascertain the various interests involved, at which meeting it was resolved that it would be to the best interests of all concerned to accept a compromise.

Thereafter an agreement was executed and duly signed by all concerned, embodying the above resolution as the only possible means of arriving at a satisfactory settlement.

The petitioners (the executors testamentary) alleged that in their opinion the agreement was the best and only means of arriving at an amicable settlement between the several parties concerned as there seemed to be no reliable data from which a proper settlement could be arrived at, and that it would avoid protracted and costly litigation and thus be of great advantage to the minors interested.

The petitioners prayed the Court to confirm the agreement, and authorise it to be attached to the deeds of transfer made in favour of the heirs, and that the costs incurred in connection with the agreement and with the present application might be paid in terms of paragraph 6 of the agreement.

The agreement provided for the payment of

† On the 1st August following the account was confirmed, there being no opposition on the part of the insolvent. Rep.

£100 to each heir, in addition to which they were to receive transfer of quarter-share of the remaining extent of the farms Grobbelaar's Rivier and Hartebeest (the farms above referred to), such quarter-share to consist of the portion of the remaining extent of the said farms after transfer had been effected of the several erven sold by the late J. C. Schoeman to sundry purchasers.

In the second will the children of one of the testator's sons, who had become insolvent, were nominated in place of their father, the trustee in whose estate raised no objection to the proposed agreement.

The Court granted the order, and ordered the costs to be paid in terms of the 6th paragraph of agreement. There would be no authority to attach the agreement to the deeds of transfer.

[Applicants' Attorney, D Tennant, jun.]

LOGAN V. THE COLONIAL GOVERNMENT. } 1898.
MENT. } June 27th.

Costs—Taxation—Review.

This was an application upon notice for an order referring the bill of costs in the above suit back to the Taxing Officer for the purpose of amending the said bill.

By (1) allowing the expenses and costs connected with the following:

(a) The inspection and perusal of the leases (about forty in number) which form the subject matter of this suit, for the purpose of making extracts setting forth the essence thereof, and the costs of copying such extracts for counsel's use at the trial.

(b) The attendance of witnesses: H. Woolf, from Stormberg Junction; G. von Below, from Middelburg-road Junction; G. H. Shawe, from Victoria West Road; H. Attridge, from Cape Town; W. H. Courtney, from Tylden; and J. R. Fuller, from Grootfontein, which have been disallowed.

By (2) reconsidering his decision regarding counsels' fees for the briefs on trial.

Notice was also given that application would be made for: (8) A special allowance, under the peculiar circumstances of this case, for the expenses necessarily incurred by the applicant's (plaintiff's) accountants in qualifying themselves to frame the schedule submitted to the Court, and to give evidence thereupon.

The Taxing Officer reduced the amount charged for inspection and perusal of the leases from £6 6s. to £2 2s.; he disallowed the expenses of the six witnesses mentioned above; he reduced counsels' fees from sixty and forty guineas to thirty and twenty; and the accountants' charges from one hundred to thirty guineas.

HH

The Taxing Officer's report was as follows:

LEASES.

I allowed the attorneys a charge of two guineas for perusing these leases and for inserting in the first few columns of the schedule all the information that was material for plaintiff's case. As the schedule was before the Court and constantly made use of by counsel there was, in my opinion, no necessity for briefing the "essence" of these leases referred to in Mr. Van Zyl's affidavit.

WITNESSES.

Five of the witnesses who were examined and whose expenses were disallowed by me were not in my opinion material and necessary witnesses for the plaintiff, inasmuch as they could give no evidence of actual profits referred to the counsel's advice on evidence.

These witnesses deposed that they either had a store or hotel in addition to the refreshment-room, that they did not separate their expenses, that they kept no books, or that they could just live on their earnings. The case of the witness Attridge stands upon a different footing; he was subpoenaed by plaintiff, but refused to give any statement and declined, in Court, to divulge his business transactions. I was therefore not in a position to decide whether he was a material and necessary witness, and had therefore no alternative but to disallow his expenses.

I have always considered it my duty to decide as to the materiality, or otherwise of witnesses examined without any direction from the Court, and my taxation has been upheld on review. (See *Lawrence v. Ward & Wessels*, 20th August, 1891; *Thuait v. Marnitz and Another*, 12th July, 1887.)

In *Edmeades v. Mostert* and *Edmeades v. Scheepers*, heard on 18th July, 1882, the Chief Justice remarked that "the case illustrates how necessary it was that the Taxing Master of the Court should exercise his judgment and discretion in regard to every item coming before him.

In *Pilgrim v. The Southampton and Dorchester Railway Company* (8 C.B., 25). Wilde, C.J., said: "The number of witnesses to be allowed is obviously one of the fittest matters to be left to the Master's discretion, a matter on which he is particularly called upon to exercise a cautious judgment."

I was also guided by the remarks of the Chief Justice, in the case now in question, addressed to Mr. Solomon, who was arguing upon the evidence which had been adduced. His Lordship as reported in the Cape Argus of 31st May, last pointed out that most of the plaintiff's witnesses stated that unless they had a store or shop their refreshment room would not pay, and he therefore did not see how they could arrive at a proper estimate.

Mr. Justice Upington later on made a similar observation.

COUNSEL'S FEES.

The fee of thirty guineas to senior counsel and twenty guineas to junior counsel seems to me ample as compared with a case like *Walker v. The Cape Central Railways* which was tried before a special jury, and occupied six days in hearing and in which brief came to 854 sheets.

In that case I reduced counsels' fees from hundred guineas to fifty guineas, and eighty-four guineas to thirty-five guineas respectively, and was supported by the Court (17th June, 1891).

ACCOUNTANTS.

I allowed the accountants thirty guineas for preparing the schedule, upon the same principle as I allow a surveyor his charges for preparing a plan which he puts in as part of his evidence, and which is used by the Court, but I do not allow him any charges of survey as that is to qualify himself, so, in this case, I disallowed all expenses incurred by the accountants in journeying about the country to collect information for the schedule.

I followed the case of *Wynberg Municipality v. War Department* (6th June, 1898).

H. TENNANT,

Taxing Officer of the Supreme Court.

Mr. Searle was heard in support of the application and contended that as regarded the leases the fee charged for perusing and inspecting them was very moderate and was less than the attorneys were entitled to under the tariff (*vide* Rules of Court, p. 169). The material parts of the leases were only briefed. As to the witnesses—the plaintiff could not go to trial without them, and they all went to prove that the average profits amounted to 20 per cent. The Court was consequently assisted by their evidence in assessing the damages. As to counsels' fees, they were not excessive and should not have been reduced. As to the accountants' charges, a special allowance should be made. The schedule was of the greatest use to the Court and to counsel on both sides. Considerable expense might have been saved if the Government had accepted the plaintiff's suggestion to appoint an accountant on their behalf.

Mr. Giddy, for the Government, contended that the witnesses, whose expenses had been disallowed, were of no assistance to the plaintiff's case, as those, who gave evidence, proved that practically they made no profit out of their refreshment rooms nor could they live if it were not for the store or shop which they carried on in conjunction with the refreshment room.

Mr. Searle in reply.

The Chief Justice said: It appears to me that the principle on which the taxing officer proceeded

to tax this bill of costs is perfectly fair. The Court is not disposed to interfere with his taxation in regard to any of the items except three. It is certainly a most difficult and invidious task for the taxing officer to have to make a full enquiry in every case as he seems to have done in the present. I think it is quite right to inquire into the case of every witness in order to ascertain whether he has been material and whether he has given any evidence which was of assistance to the Court. Unfortunately the taxing officer was not able to be present in Court to hear all the witnesses, and it was impossible for a judge to take down every word which was spoken. The Court would have been better able to decide upon a point like this had the application been made immediately after the trial, when the matter was fresh in their recollection. Taking that view, the Court would not have allowed the expenses of Shawe, or Von Below, or Attridge, and the taxing officer was right in not allowing them. But there were three other witnesses. The taxing officer seemed to have considered, and rightly considered, whether at the particular places where those three witnesses were conducting their business, profits could have been made independent of a store. But there was another point on which their evidence was of some assistance to the Court and that was in deciding generally in regard to refreshment rooms whether the profits amounted to as much as 20 per cent., and upon that point the three witnesses in question gave evidence which was of assistance to the Court. That being so, the Court would allow the expenses of those three witnesses. The Court did not wish in any way to interfere with the practice of the taxing officer where he had to inquire into the material value of the evidence given by witnesses. Of course, his decision was always open to review, and if the Court thought he had erred they would review his taxation, and allow the expenses which he had disallowed.

The lordships concurred.

[Plaintiff's Attorney's, Messrs. Van Zyl & Buissinne; Defendant's Attorney's, J. H. Reid & Nephew.]

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- <i>Where the diagram attached to a deed of transfer does not conflict with the description of the boundaries given in the body of the deed such diagram affords valuable evidence as to the boundaries of the land transferred. The owner of land transferred a portion thereof by a deed which described such portion as being bounded on the west by "the remaining extent."</i> <i>The diagram attached showed the middle of a certain main road as the western boundary, running then where it still runs.</i>	

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<i>Held, in an action brought by the owner of such portion against the owner of the remaining extent, that the middle of the road was the boundary between the two properties.</i>	
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<i>When a legal duty is imposed upon and undertaken by a public body or individual and no other remedy is expressly provided in case of non-performance, a person who, without contributory negligence, sustains damage by reason of such non-performance, is entitled to recover against the public body or individual, in the absence of proof that the duty was impossible of fulfilment.</i>	<i>The Court refused to direct the Taxing Officer to tax a reasonable remuneration proposed to be paid out of the proceeds of the sale of derelict lands by a Municipality to an agent who had been employed by the Municipality for the special purpose of instituting an exhaustive inquiry as to the exact amount of rates payable in respect of each lot attached.</i>
<i>A public body which undertakes the construction of any work is liable for damages occasioned by its misfeasance whether the construction was obligatory or permissive.</i>	<i>Ex-parte Pinn (in his capacity as Town Clerk of the Municipality of Port Elizabeth 187</i>
<i>No liability, however, attaches for damages occasioned by the non-performance of powers which are merely permissive.</i>	<i>Discovery — Rule of Court 333 (b) — Party to an action—Practice.</i>
<i>The W. Municipality possessed the power of lighting its streets and covering the furrows running along such streets, but no obligation was imposed upon it to exercise such power.</i>	<i>A person becomes a party to an action within the meaning of Rule of Court 333 (b) as soon as the summons has been issued.</i>
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<i>Jordaan v. The Worcester Municipality 195</i>	<i>S. the assignee of the right of representing Gilbert and Sullivan's operas in the Colony, applied for an interdict restraining B. and P. from giving representations of the operas in a town in which they had advertised to appear.</i>
<i>Deed—Registration—Practice.</i>	<i>A rule nisi operating as an interim interdict was granted.</i>
<i>A deed, although lodged in the Deeds Office, is not considered as passed until it has been signed by the Registrar of Deeds.</i>	<i>On the return day the rule was discharged, but the respondents were ordered to pay 10 per cent. of the gross proceeds, which might be realised by representations of the operas in question, to the Deputy Sheriff of King William's Town to abide the result of any action which might be brought by the applicant for infringement of his rights.</i>
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<i>DEPUTY Sheriff—Attachment—Rights of pledgee — Interdict — Van den Heever v. The Deputy Sheriff for Albert and Beyleveld 116</i>	<i>S., the author of certain plays, autho-</i>
<i>Derelict lands—Act 28 of 1881—Attachment — Sale — Inquiry — Agent — Remuneration—Taxation,</i>	

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<p>rised M. to be his representative in South Africa to use, sublet, or collect fees for all and every play or comedy of his of which he might supply M. with an authenticated copy. B. advertised "Guiltless," one of S.'s plays, for a certain evening. M. obtained a rule nisi restraining B. from playing "Guiltless." On the return day M. was unable to prove to the satisfaction of the Court that "Guiltless" had been copyrighted in England, and failed to produce an authenticated copy of that play.</p> <p>The rule was discharged with costs.</p> <p>Marsh v. Bevan ... 220</p> <p>EJECTMENT—Lease—Rent in arrear—Notice—Tender within a reasonable time—Turnbull v. Garlick ... 140</p> <p>1. EXECUTORS—Account—Extension of time within which to file—In the Estate of the late George Palmer... 143</p> <p>2. — Claim for services rendered to the deceased—Refusal to admit—Evidence—Interdict.</p> <p>The Court approved of the action of executors in refusing to admit a claim of £815 alleged to be due in respect of services rendered to the deceased in the absence of proof of the bona fides of the claim, and refused to grant an interdict restraining the executors from selling certain landed property in the estate claimed by the applicant, leaving him to his remedy in damages in the event of his establishing his claim.</p> <p>Johnson v. Powell's Executors ... 131</p> <p>Executor testamentary—Absence from the Colony — Transfer of land—Solemn declaration—Act 19 of 1891, section 5.</p> <p>The Court authorised two executors testamentary, without making the solemn declaration under Act 19 of 1891, section 5, to pass transfer of landed property sold in the estate without the assistance of the third executor, who had been absent from</p>	

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<p>the Colony since 1868, and who was reported to be dead, but no proof of his death was before the Court.</p> <p>Ex-parte The Board of Executors and Cartwright ... 123</p> <p>Holograph will—Attestation—Letters of administration—Master—Wills Ordinance, No. 15 of 1845, section 3. B. executed a will written throughout in his own handwriting.</p> <p>The will covered three pages of foolscap paper, but was signed by the testator and witnessed on the third page only.</p> <p>The testator bequeathed his entire estate to his executors upon trust for the sole benefit of his children, to be equally divided amongst them share and share alike, such share to be paid to each of them upon his or her attaining the age of 21, and in the event of any of them dying before that age, then his or her share was to be equally divided amongst the survivors provided however that so long as his wife lived, to the approval of his executors, single and unmarried the executors were to pay the interest derived from the various investments to her for the support of herself and the children, and in case all the children died before 21, then the executors were to pay the interest derived from the investments to his wife for her sole use and benefit so long as she lived single and unmarried, and on her death or remarriage, the executors were to realise the estate and hand the proceeds as a bequest to the trustees of the Diocese of Cape Town to be invested by the Diocesan Finance Commission for the use of the Sick and Aged Clergy Fund of the English Church in South Africa, if such fund should be at the time still existing, but should that fund not be in existence, then the money was to be invested for the benefit of such Diocesan Fund or work as</p>	

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<i>the Lord Bishop for the time being might determine.</i>	
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L. gave instructions that the wine was to be sent to the boarding-house at which he was staying.	
The wine was not delivered immediately after the sale, but as it was being sent on the same evening between 7 and 8 p.m. to the purchaser's boarding-house, it was seized by a constable and P. was tried and convicted for contravening Act 28 of 1883, section 73, sub-section 7.	
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during the pleasure of the Council, and no one shall bring into, make, or sell, or barter any Kafir beer or other intoxicating liquor whatsoever in the location."		was at liberty to renounce her life interest and pay out or secure the children's shares upon the basis of the valuation and for that purpose sell such portion of the immovable property as might be found necessary. The cases of Lucas vs. Hoole (Buch. 1879, p. 132) and Smith vs. Executors of Sayers (Foord, 66) distinguished.	
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Husband and wife, married in community of property, made a mutual will by which they appointed the survivor as their heir with their children of the first dying, directed a valuation of the joint property in order to ascertain the shares of the children, the immovable property being valued at ten shillings a morgen, and provided that the survivor should remain during his or her lifetime in possession of the joint estate, "but so that the said survivor shall have no right to sell. . . . that property, in such manner that such survivor shall not be bound to pay out during his or her natural lifetime to the majors or married heirs their portions."		Held, that the bare fact of such partnership having so existed did not entitle the plaintiffs to recover the price of the goods from the defendant.	
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REPORTS OF ALL CASES

DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE MONTHS OF JULY, AUGUST AND
SEPTEMBER, 1893.

(WITH TABLE OF CASES AND DIGEST.)

REPORTED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE
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ERRATA.

In the judgment in *Sellar Bros. v. Clark* omit the words *to him* in the 3rd line from top of 1st column at page 199, and read *due by the partnership*.

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SUPREME COURT.
(IN CHAMBERS.)

Ex parte VON POST. { 1898.
July 4th.

Under special circumstances the Court authorised a father, who had registered property in his minor daughter's name, to mortgage the property for the purpose of recouping him for expenditure incurred by him in improvements, he undertaking to be personally liable for the interest.

The petitioner alleged that being ignorant of the law on the matter he considered that he would have full control over the property with regard to mortgaging, selling or transferring it, and that

The matter was referred to the Master and he reported as follows: In most cases where a parent voluntarily causes land acquired with his own money to be transferred to a minor child it may reasonably be presumed that he does so with the intention of making a free gift, which can then be revoked only for lawful reasons. But there may also be cases in which such a course is adopted with the object of securing the property against the creditors of the parent if he should afterwards happen to get into difficulties. In either event when once the land has been registered in the child's name it appears to me a somewhat dangerous thing to relieve the parent of the legal consequences of his own act. In the present instance the petitioner states that he had the land transferred to his daughter without having devoted much consideration to the matter, thinking that it was "a suitable thing to do," and believing that he would still be able to exercise the full rights of ownership over it. I do not see how it could be to the benefit of the minor that the

mortgage should be allowed, but it is of course for the Court to say whether the circumstances set forth by the petitioner are not nevertheless such as to justify him in asking that he should be recouped for the expenditure incurred by him in improvements. The property was purchased in 1891 for £102 10s. It is now worth £450 according to the sworn appraiser's valuation, and this bears out petitioner's statement that he has spent about £800 in building and improvements. If the application is granted the property should, I think, be mortgaged for the capital sum, the petitioner alone being liable for the interest.

Mr. Graham was heard in support of the application. He cited "*Ex-parte Biggs*" (2 C.T.L.R., 828).

The Chief Justice said: In the special circumstances of the case the Court will grant the order in terms of the Master's report, and treat the application *nunc pro tunc*, as if the petitioner had applied to the Court, before he made the improvements, for leave to mortgage for the purpose of making the improvements. The minor would benefit to the extent of £100 by reason of the improvements.

[Applicant's Attorney, C. C. Silberbauer.]

Ex parte MASKEW. { 1898.
 { July 4th.

Administrator — Will — Fidei-commissary inheritances.

M. by her will appointed her son W.W.M. executor and administrator of certain fidei-commissary inheritances left to her daughters.

In a codicil to her will she appointed her sons W.W.M. and N.T.M. co-executors, but made no mention of the administration of the fidei-commissary inheritances further than by giving a direction that her executors might pay the amount of the inheritances into a trust company if they considered it needful.

During his lifetime, W.W.M. administered the fidei-commissary inheritances of his sisters but always consulted his brother N.T.M. as to the investments.

After the death of W.W.M. a bond, which had been passed in his favour as trustee of the fidei-commissary inheritances of his sisters was paid.

N.T.M. tendered the bond by cancellation on a consent signed for him as trustee and agent for his sisters,

The Registrar of Deeds refused to cancel the bond as N.T.M. had no locus standi.

On application being made to the Court, N.T.

M. was appointed administrator with power to cancel the bond and with the other powers appertaining to the office of an administrator.

This was the petition of Netlam Tory Maskew.

By the will of petitioner's mother certain sums of money were left to her three daughters, and they were also appointed joint heiresses with their brothers of the residue of the estate of the testatrix.

The testatrix burdened all the legacy and share of her estate devolving upon her daughters with a *fidei-commissum*.

Under the will William Wilson Maskew was nominated executor and administrator of the estate of the testatrix and of the fidei-commissary inheritance.

By a codicil to the will, the testatrix appointed the petitioner jointly with William Wilson Maskew her executor, but made no reference to the administration of the fidei-commissary inheritance beyond giving her executors power to appoint a public body or chamber for her minor grandchildren, whose mothers were under an act of *fidei commissum*, where their portions could be left on interest.

The petitioner and William Wilson Maskew were duly appointed executors, and the share of the estate burdened with the *fidei-commissum* was invested on mortgage of landed property.

William Wilson Maskew attended principally to the investment, but he always informed the petitioner of what was done.

The petitioner's sisters were aware that he acted as co-executor and administrator of their inheritance, but they never objected, and their children, on whom the inheritance will eventually devolve, likewise raised no objection, though they are all majors with the exception of one boy, who has almost attained his majority.

Amongst the bonds passed to secure money lent by petitioner and Wm. Wilson Maskew out of the inheritance, in which their sisters have a life interest, was one for £400, bearing date 9th June, 1890, passed by J. G. and J. C. Lessing in favour of Wm. Wilson Maskew, as trustee of the fidei-commissary inheritances of his sisters.

The said bond has been paid. The mortgagors are anxious to have it cancelled. Wm. Wilson Maskew is dead. The petitioner tendered the bond for cancellation on a consent signed by him as trustee, and also tendered it on a consent signed by him as agent for his sisters, under a

power of attorney which was annexed to the petition.

The Registrar of Deeds, however, refused to cancel the bond.

The petitioner alleged that it was his intention to reinvest the amount of the bond on the first mortgage of landed property, and that it would be necessary to name some person as trustee to whom the new bond might be passed in trust.

The petitioner and the late Wm. Wilson Maskew never appointed any public body or chamber to act for them. They kept the money for investment, as they wished to avoid expense.

The petitioner stated that he did not wish to appoint anyone to act for him. At present he invests the money carefully on first mortgage of landed property, collects the interest, and pays it to his sisters free of charge, and that if he appointed a company to act, such company would charge for its services and the income of his sisters would be reduced.

The petitioner prayed for an order authorizing him to administer the fidei-commissary inheritances of his sisters, and appointing him trustee, and that the Registrar of Deeds might be empowered to cancel the mortgage bond above described on a consent signed by him as such administrator or trustee.

The matter was referred to the Registrar of Deeds, and he reported that the petitioner had no *locus standi*, the bond being in favour of Wm. W. Maskew, as trustee for the fidei-commissary inheritance of A. P. and I. C. Maskew, and as these ladies were debarred by law from consenting, he refused to cancel the bond.

Mr. Sheil was heard in support of the application.

The Court appointed the petitioner administrator, with power to cancel the bond, and with the other powers appertaining to the office of an administrator.

[Applicant's Attorneys, Messrs. Van Zyl & Buismann.]

Ex-parte CALITZ. { 1898.
July 4th.

Lunatic—Curator—Landed property—Sale—Confirmation.

Where it was clearly for the benefit of a lunatic the Court confirmed a sale by the curator of landed property registered in the lunatic's name.

This was the petition of Jacobus Christian Calitz, in his capacity of curator of the property in the estate of Christina Susanna Calitz, of Nooitgedacht, in the division of Oudtshoorn.

On the 28rd of March last, the petitioner was duly appointed curator of the property of his sister, C. S. Calitz, who was declared of unsound mind.

C. S. Calitz is the registered proprietor of certain one-fourth part or share of the farm Appelfontein, and of lots 78, 29, 45A, and of 46 of the undivided farm Nooitgedacht.

The petitioner's elder brother, the late W. G. Calitz, acted as guardian of his sister up to the time of his death in January last, and on her behalf leased out the ground.

For the last five or six years not more than £10 per annum was procured as rent for the said ground, which was altogether insufficient for the maintenance of the said C. S. Calitz.

On the decease of the late W. G. Calitz, it was deemed expedient to apply to the Circuit Court at Oudtshoorn for the appointment of a curator, when the petitioner was duly appointed.

The petitioner alleged that shortly after his appointment, feeling assured that at least £800 could be procured by selling the ground, which at 6 per cent. would secure £18 per annum towards the maintenance of the said C. S. Calitz, and there being certain liabilities to be settled out of the estate with no funds to meet the same, he caused the said property to be advertised for sale, and on the 6th May last it was put up to public auction when it realised £504 15s., which after paying the liabilities of the estate, will leave a balance of £400 to be invested on behalf of the said C. S. Calitz.

The petitioner prayed for an order authorizing and confirming the sale of the 6th May last, with the necessary authority to transfer the said ground to the purchasers thereof.

Mr. Searle was heard in support of the application.

The Court granted the order as prayed.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

Re BOWKER'S ESTATE. { 1898.
July 4th.

Mortgage bond—Application for leave to pledge—Executors—No order.

Mr. Webber applied for authority to the executors in the above estate to raise a sum of money on security of certain mortgage bond for £1,000, not yet due, for the purpose of discharging the liabilities of the estate.

The petitioners were the executors testamentary of the estate of the late Robert Mitford Bowker, who during his lifetime advanced to his two sons the sum of £1,000 on condition that the capital should be repaid six years after his death.

This amount was secured by a mortgage bond passed by the two sons on the 7th April, 1898. The petitioners filed an account showing the sum of £527 8s. 4d. as being due by the estate, the only asset being the above-mentioned bond; not due until 26th August, 1898, and they now prayed for leave to raise a loan on security of the bond bearing interest at a rate not to exceed 6 per cent. per annum for such amount as would cover the debts due by the estate, together with the costs of cession and the costs of the present application.

The Court refused to grant an order.

The Chief Justice said: There is no necessity for this application. It is the duty of the executors to liquidate the estate, and the best way of doing that is to sell the assets. There will be no order on the present application. If the executors find that they cannot sell the bond, it will then be time enough for them to come to the Court.

[Applicant's Attorney, R. O. Nelson.]

HENNINGS V. HENNINGS.

Mr. Currie moved on behalf of petitioner (Susanna L. Hennings) for leave to sue by edictal citation *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

The matter was referred to counsel.

BUSSOUW V. HARRIS.

Mr. Jones applied for leave to sue by edictal citation in an action against Mr. J. Harris, should he be in the South African Republic, for the recovery of the amount of a mortgage bond.

The Court granted leave to attach the property *ad fundandam jurisdictionem*, and to sue the defendant by edictal citation, to be returnable on 10th August, personal service if possible, failing which, one publication in the "Johannesburg Star."

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

WIESE V. MOSTERT.

1898.
July 10th
and 12th.

Land—Sale—Transfer—Action.

This was an action instituted by Gerhardus Marthinus Wiese and Tobias Gerhardus Wiese against Jannetj Sophia Mostert for transfer of the defendant's shares in certain farms alleged to have been sold by her to the plaintiffs.

The declaration was as follows:

1. The plaintiffs reside at Grasberg, in the district of Calvinia, and the defendant resides at Oloudakraal, also in the district of Calvinia, and is the registered proprietor of certain shares in the farm Kookfontein, or Zwellengrebel, situate in the district of Calvinia, to wit: Half share in Zwellengrebel, quarter in Kromhoek, one-twentieth in Bokkefontein, and one-twentieth in Kleintfonteinhoek.

2. On or about the 21st September, 1892, and at Kookfontein, the defendant sold to the plaintiffs, and the plaintiffs bought from the defendant, the defendant's said share for the sum of £700, and after the sale the plaintiffs took possession of the said share of the said farms, and are still in occupation and possession thereof.

3. After the said sale, it was agreed between the said parties that in consideration of the plaintiffs undertaking to negotiate with defendant's creditors, and to pay off all her debts, the amount thereof not to exceed £700, the defendant would reduce the price of the said purchase to such amount of her debts paid by the plaintiffs if they should be less than £700.

4. The plaintiffs, in pursuance of the said arrangement, paid off the debts of the defendant to her creditors to the amount of £599 4s. 1d., but the amount was by mutual error and mistake stated as £598 12s. 4d., and on the 20th October, 1892, the defendant signed an acknowledgment as having sold her said share of the farm to the second-named plaintiff, who was acting for and on behalf of the plaintiffs, for the said sum.

5. The said debts of £599 4s. 1d. are all the debts of the defendant which the plaintiffs are able to ascertain after due inquiry and consultation, but for greater certainty the plaintiffs are willing to pay to the defendant, and have tendered to do so, and hereby again tender to

the defendant the sum of £101 7s. 8d., being the balance between the sums of £700 and £598 12s. 4d.

6. On the 31st October the plaintiffs received a promissory note for £601 1s. 9d., purporting to be signed by the defendant or by her authority as security for the sums as paid by them as aforesaid, pending transfer of the said share. The plaintiffs have retained and still retain possession of the said note, and have tendered and hereby again tender to hand up to the defendant the said note upon transfer being passed to them by the defendant of her said share of the said farm.

7. All things have happened, all times have elapsed, and all conditions have been fulfilled to entitle the plaintiffs to receive transfer of the said share of the said farm, but the defendant, though requested so to do, refuses to pass transfer.

Wherefore the plaintiffs pray :

(a) That the defendant may be ordered to pass transfer to the plaintiffs of her said share of the said farm, sold as aforesaid to the plaintiffs, the latter tendering the sum of £101 7s. 8d. and aforesaid promissory note.

(b) Such alternative relief or damages as to this Honourable Court may seem meet.

(c) Costs of suit.

The defendant in her plea admitted paragraph 1 of the declaration, but save as hereinafter admitted she denied paragraphs 2, 3, 4, and 5. [This paragraph was amended by leave of the Court, and the defendant craved leave to refer to her deeds of transfer for the land which she held.] She said that on or about September, 1892, she entered into an arrangement with the plaintiffs whereby they agreed to pay her debts, then amounting to about £600 according to her belief, and she agreed to pay them interest at 5 per cent. upon the amount advanced by them for the above purpose.

She specially denied that she ever sold her landed property to the plaintiffs, or that she knowingly signed any document to that effect.

She said that she was old, feeble, and also blind; that it was represented to her by the plaintiffs that they had satisfied her debts, and she was requested by them to sign a document acknowledging that she owed the plaintiffs the money that they had so paid, together with interest at 5 per cent. She denied that she signed any promissory note as security, as alleged in the declaration.

She said that if the plaintiffs obtained her signature to any document of sale and purchase of her landed property the same was obtained without her knowledge, and by fraudulent misrepresentation, and the said document was for the reasons above set forth invalid.

She said that she allowed the plaintiff Gerhar-

das Wiese to occupy a portion of her property in consideration of his agreeing to waive the portion of the interest owing to him in respect of the money advanced by plaintiffs.

She said that she had called upon the said Wiese to quit the said portion as she was entitled to do, and that she was prepared, when called upon, to pay the amount of the money advanced as above with interest at 5 per cent.

Wherefore she prayed that plaintiffs' claim might be dismissed with costs.

And for a claim in reconvention the defendant, now plaintiff in reconvention, said :

She craved leave to refer to the matters above pleaded. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle her to call upon the said Wiese, defendant in reconvention, to quit the portion of her property of which he was now in occupation, but he had refused to do so.

The plaintiff in reconvention claimed :

(a) A decree of ejectment against the said Wiese, she tendering to pay the amount advanced as above set forth.

(b) Alternative relief.

(c) Costs of suit.

The replication was general, and issue was joined on these pleadings.

Mr. Juta and Mr. Currey appeared for the plaintiffs, and Mr. Searle and Mr. Webber for the defendant.

At the trial the plea of fraud was abandoned, and the claim in reconvention for ejectment withdrawn, the defendant's case being that she sold the farm Kookfontein, or Zwellengrebel, to the plaintiffs on the 20th October, 1892, for £598 12s. 4d., in terms of a document drawn up on that date.

The plaintiffs' case was founded on an earlier document, signed on the 21st September, 1892, and which stated that the defendant acknowledged to have sold "her place" to the plaintiffs for £700. Their contention being that the words "the place" included all the defendant's interests in the different farms referred to in the declaration.

Tobias Gerhardus Wiese, one of the plaintiffs, deposed : I remember the defendant, Mrs. Mostert, sending a message to me by her son Piet Mostert, about 21st September, 1892. I went to the defendant's place and saw her. She spoke about my lending her money to pay her debts, and in consideration of my brother and myself doing so, she sold us her place. By her place I understood Kookfontein or Zwellengrebel, Bokkefontein, Kromhoek, and Kleinfonteinhoek, all of which are used and worked by Mrs. Mostert. She told me that Mr. Van Rhyn had a bond over the property, and that we were to pay his debt first as being the largest. Piet Mostert went with

me to Mr. Van Rhyn's and I paid off £440 on the bond. On this occasion declarations of purchaser were drawn up by Mr. Van Rhyn, and they were then given to Mr. Tancred, the defendant's agent. Piet Mostert was present on behalf of his mother. The farms referred to in the declaration of purchaser were Bokkefontein, Zwellengrebel, and Kleinfonteinhoek, all the defendant's land except Inhoek and another farm. Subsequently we went with Mr. Mostert, J.P., Mr. Tancred, Mr. Westhuizen, and Mr. Coetzee, to Mrs. Mostert's. Mr. Coetzee asked her if she had told us of the underhand division of the ground made by her to him, and she said that we already knew of it. We paid defendant's debts as far as we could find them. The declaration of the seller was not signed, because one share, viz., Kromhoek, did not appear in it. Tancred was to put the matter right. He took the declaration away with him. On the same day (29th October), I received a promissory note for £801 1s. 9d. with interest.

By the Court: I kept that document. Tancred said if you don't take it you will lose money, as the defendant denied that she had sold us her ground. After the sale my brother took possession of the ground. I saw him in possession of the land. He put his cattle on the land, and no one disturbed him.

Cross-examined: The promissory note was signed at Bokkefontein. Tancred signed the note, and defendant touched the pen. She denied having sold the farms. The bond given to Van Rhyn showed all the land which we purchased. The document of the 20th October was written by me, and copied by a Jew named Marous Beiles.

The witness, on being recalled by the Court, stated that Piet Mostert accompanied him to Mr. Van Rhyn's to see that the money was paid to the latter.

Gert Wiese, one of the plaintiffs, deposed that he knew Piet Mostert, son of defendant. Piet first came to him about this sale. He went with his brother to Mr. Van Rhyn, and there was a declaration drawn up. It was a declaration of purchase. They paid Van Rhyn £440 on the bond. Piet Mostert and Tancred mentioned the pieces of ground that were covered by the bond, namely, Kleinfonteinhoek, Zwellengrebel, and Bokkefontein. Kromhoek was not mentioned. It was stated, however, that if any place had been omitted, it could afterwards be inserted in the deed. Witness had known Mrs. Mostert's land for years. He knew it simply as Kookfontein. He took possession of the farm in October. He turned all his cattle on to it, and they grazed over the whole four pieces, including Kromhoek. He remembered the meeting in Mrs. Mostert's house when the underhand sub-division was signed. There was then some talk about the

declaration which had not then been signed, because Kromhoek had not been put in.

Cross-examined: He was certain that Mrs. Mostert heard everything that was said that day about the addition to the deed. He did not ask anyone's permission to graze his cattle on Kookfontein after he purchased it. Could not say what the purchase price in the declaration was. Philip van der Westhuisen was present when the addition was made to the sub-division deed. Mrs. Mostert heard what was being read out and understood everything.

Cross-examined: Mrs. Mostert was blind but not deaf. Witness understood the agreement. It was a sale. He knew all the farms very well, and had always been accustomed to speak of Mostert's place as Kookfontein.

For the defence,

Petrus Benjamin Rhyn deposed that he knew the locality where those farms were situated very well. The smaller farms were separate altogether from Kookfontein. Zwellengrebel, for example, was never known as Kookfontein. He remembered the Wieses coming to him in September with Piet Mostert to pay certain money which Mrs. Mostert owed witness. No bond was passed. The plaintiffs asked him to draw up a declaration of purchaser, but they were not sure of the places they had bought, so Mr. Wiese asked witness to leave it alone as he was not certain as to the places. Zwellengrebel alone was valued at £1,800; and Mrs. Mostert owned half of it, which would make her share worth about £850. The other farms would be worth about £260. A fair value of the entire properties would be £900.

Cross-examined: Could not say what properties he was to hold the mortgage over in respect of the money which he advanced to Mrs. Mostert.

Johannes Coetzee stated that he lived on the farm of Kookfontein, on the part called Zwellengrebel. He owned an undivided half-share. He bought it when his father died. He had now lived on the property ten years. Had never heard the word Kookfontein applied to all the smaller farms. The farms Kromhoek and Bokkefontein he had also bought at a sale. They were put up separately. Subsequently he gave up Bokkefontein and got a larger portion of Kookfontein.

Cross-examined: He was present when the addition was signed by the Wieses to the deed of subdivision. He heard that the Wieses had bought the property, and he asked Mrs. Mostert if she had told Wieses of the underhand agreement whereby he (witness) had become owner of a certain portion of the ground.

Petrus I. Tancred deposed that he lived on Olundskraal, Calvinia. He never acted as Mrs. Mostert's agent in the sale of these farms.

Cross-examined: In 1890 he drew up the sub-

division agreement between Mrs. Mostert and Coetzee. He was not paid for that service. He was present at Mrs. Mostert's house when the addition was made to the agreement of subdivision. His business was that of a storekeeper. He did the work at Mrs. Mostert's request. He was never paid anything. He was in the habit of administering estates. He had been carrying on the business of an agent for many years. On the 29th October, the same day as the Wieses were at Mrs. Mostert's, he bought the property for £750 on behalf of Coetzee. It was witness who wrote out the promissory note at the request of the Wieses. Before he asked the Wieses to sign he made sure that the deed was correct. Mrs. Mostert told the Wieses that she did not mind giving them a promissory note, but she had not sold them the farm. She knew what she was doing. She had an intimate knowledge of her affairs. When witness was present at Mrs. Mostert's house he read out the declaration of seller in English.

By the Court: He witnessed the document, but did not explain it to her.

The evidence of Mrs. Mostert, taken on commission, having been read to the Court, this concluded the case for the defence.

Piet Mostert, called by the Court, deposed that his mother sold nothing whatever to the Wieses.

Cur ad vult.

Postea (July 12th.)

The Court delivered judgment.

The Chief Justice said: The Court has had considerable difficulty in dealing with this case. The plaintiffs claimed specific performance of a contract of sale of certain farms belonging to defendant, and the defence originally set up was that of fraud. After a commission had been appointed, and witnesses examined, the defendant's legal advisers withdrew the charge of fraud, and wrote a letter to plaintiffs' attorney offering to carry out the contract up to a certain point. That was to say, to give transfer of the farm Zwellengrebel, on payment of the purchase amount mentioned in the second contract of sale—namely, £598. From the declaration, it was difficult to know upon which of the two contracts the plaintiffs founded their case, but it was clear on looking at the first contract, and the circumstances under which it was entered into, that it was a contract upon which the plaintiffs could not possibly found their case. The first contract related to a place sold by the old lady (the defendant) for the sum of £700. The second contract mentioned the farm Kookfontein, or Zwellengrebel, as being sold not for £70, but for £598 odd. Now, clearly therefore, there appeared a fresh consideration and a different place mentioned in the second contract, and the Court must look upon the second contract as the one which was binding upon both

parties. If the charge of fraud had been persisted in, even upon the meagre evidence which had been given, I should have had grave doubts whether the Court ought not to hold in regard to the second contract that there was such dealing on the part of plaintiffs as to amount to fraud. When the first contract was entered into, the defendant's two sons were not only present, but signed the document. The contract price was to be £700. In the following month, however, one of the plaintiffs came to the old lady, and brought, not the two sons who were present at the former interview, but a man called Beiles, and the protection which this old lady ought to have had from the presence of her two sons was wholly denied her. It was quite clear that the old lady was almost an imbecile at the time; she was eighty-two years of age; blind, in delicate health; according to the certificate of the doctor, she was in a state of progressed debility. (His lordship read the certificate.) Now, I have no hesitation in saying that when people deal with a lady in defendant's condition, it was their duty to see that she was properly advised before entering into a contract with her. There was no clear proof here that she had had proper advice. To judge by the evidence given by this man Beiles, I doubt if she was told clearly what the contract was; she seemed to have been led to believe that instead of being a party to a contract of sale, she was really giving a receipt for money which had been paid for her. The charge of fraud having been withdrawn, the plaintiffs must be strictly bound to the contract which they have proved, and no presumption would be made in their favour in regard to what was actually sold in October. In October the defendant sold the farm Kookfontein or Zwellengrebel for £598. Plaintiffs now claim that the farm Kookfontein or Zwellengrebel includes the three other farms Bokkefontein, Kromhoek, and Kleinfonteinhoek. At first they claimed Inhoek, but at the trial Kleinfonteinhoek was substituted. If Kookfontein had been mentioned all along there would have been something in the plaintiffs' argument, but inasmuch as Zwellengrebel was specially mentioned—and it is clear from the title deed as well as from the evidence that the farm Zwellengrebel has a distinct, meaning and nowhere includes the other farms—I am clearly of opinion that Zwellengrebel only was meant to be sold, and that the purchase price was £598. In respect of that farm Zwellengrebel, a tender had been made to pass transfer, and the defendant is bound by that tender. The question of costs next arose. If the Court gave judgment for the farm Zwellengrebel alone, plaintiffs would succeed in obtaining a substantial part of their claim. The defendant, in making the tender, ought also to have withdrawn the charge of fraud upon the

pleadings, and the doubtful question was whether defendant should not pay the costs. On the other hand, the Court must bear in mind that the plaintiffs had claimed considerably more than they were entitled to. Upon the whole, the Court had come to the conclusion that as to the costs incurred after the date of the tender, there should be no order, and that each party should pay their own costs; but in regard to the costs incurred up to the date of the tender, the Court was of opinion that they should be paid by the defendant, because the main object of the commission was to prove fraud, and when fraud was withdrawn it was only fair that all costs up to that date should be paid by the defendant. The only question that remained was whether the plaintiffs would prefer judgment for the amount which they actually paid, or whether they would take judgment ordering transfer of Zwellengrebel for the sum of £598.

Mr. Juta: We will take the farm.

The Chief Justice said the Court gave no decision as to how far the agreement between Coetzee and the old lady would affect the plaintiffs. The Court would order that the defendant forthwith transfer to the plaintiffs her half-share of the farm Zwellengrebel, and pay all costs incurred by plaintiffs up to June 21, 1898; each party to pay his own costs after that date.

Mr. Justice Buchanan concurred, and observed that he did not think any fraud could be charged against the plaintiffs as regarded the original contract, but the second document had been to him a stumbling-block all through. There was a distinct agreement to sell certain properties for a certain sum. Fraud, if it came in at all, only came in the second document. It was at any rate not a contract very creditable to the parties. Any one dealing with an infirm old lady of eighty-two should take care to deal with her *bona fide*.

Mr. Justice Upington concurred, and said he would have been glad to have had more evidence than was given by either side as to the circumstances under which the old lady and plaintiffs were first brought together. He should like to hear how it was that the Wieses were approached, and by whom.

[Plaintiffs' Attorney, P. M. Brink; Defendant's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. ADAMS. { 1898.
July 13th.

Medical and Pharmacy Act, 1891, section 35
—Contravention—Resident Magistrate—
Exceeding jurisdiction—Reduction of fine
and alternative punishment.

Mr. Justice Upington said that this case had come before him as judge of the week from the Resident Magistrate of Priskaka.

The accused was charged with contravening Act 84 of 1891, section 85 in that upon or about the month of December, 1892, and at or near Koolfontein, in the district of Hay, within two miles of the boundary of the district of Priskaka, the said Adams did wrongfully and unlawfully and falsely use the name of a doctor of medicine and practise as such.

The prisoner was found guilty and sentenced to pay a fine of £50, in default of payment six months' imprisonment with hard labour.

Mr. Justice Upington said the case had not been remitted by the Attorney-General, and as there was nothing in Act 84 of 1891 giving special jurisdiction to the Magistrate, he must be held to have exceeded his jurisdiction, which is limited to £10 or three months' imprisonment. The fine must therefore be reduced to £10, but with regard to the reduction of the alternative punishment, the Court would like to hear the Attorney-General.

Mr. Giddy, for the Crown, pointed out that under the section a fine of £100 might have been inflicted, and submitted that the Magistrate did not consider the fine of £50 equivalent to six months' imprisonment.

The Court reduced the fine to £10, and in default of payment the accused to be imprisoned and kept at hard labour for one month.

PROVISIONAL CASES.

SNOOKE V. ELLIOTT. { 1898.
July 12th.

Mr. Searle moved for provisional sentence on two promissory notes, one for £44 and another for £45 17s. 6d.

Granted.

BLAKE V. HUGO.

Mr. Shippard moved for costs and interest on a promissory note, the principal sum having been paid since issue of summons.

Granted.

MARSH V. DE VOS.

Mr. Maskew applied for the final adjudication of defendant's estate.

Decreed.

SOUTH AFRICAN ASSOCIATION V. VAN EEDEN'S EXECUTRIX.

Mr. Maskew moved for provisional sentence on a mortgage bond of £70, which had become due by reason of non-payment of interest.

Provisional sentence granted, and property declared executable.

RALL AND ANOTHER V. CRONJE.

Mr. Tredgold moved for the final adjudication of defendant's estate.

Decreed.

THE MASTER V. WALLACE'S EXECUTORS AND BROCKMAN'S EXECUTORS.

Mr. Giddy applied for an order for defendants to file their accounts.

The Court made the usual order.

EATON, ROBINS AND CO V. COOPER.

Mr. Barber applied for provisional sentence for costs, the principal having been paid since issue of summons.

Granted.

WALTERS V. BEVERN.

Mr. Sheil applied for judgment under rule 329 for the sum of £87 with interest and costs.

Granted.

REHABILITATIONS.

On motion from the Bar, the following insolvents were granted their rehabilitation; Isaac Johannes van Rooyen, jun, Bonke Frenstra, Henry Arnold Bam, Petrus Ouzius Bam, Tjaart Petrus van der Walt, Hermannus Stephanus Bosman, and Julius Hausman.

KK

GENERAL MOTIONS.**DORMEHL V. DORMEHL.**

Mr. Jones asked the Court to make absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

The Court made the rule absolute and appointed Mr. Searle to act as counsel.

VAN ZYL V. COETZEE.

Mr. Watermeyer moved to have the award of the arbitrators in the matter in dispute between the parties made a rule or order of Court.

Granted.

PRICE V. PRICE.

Mr. Currie moved on behalf of petitioner Catherine B. Price, for leave to sue by edictal citation, *in forma pauperis*, in an action against her husband for restitution of conjugal rights, failing which for divorce.

Referred to counsel.

IN THE ESTATE OF LATE GEO. B. PERKS.

Mr. Tredgold moved for leave to the executors to dispose of certain unproductive piece of land, the property of the estate, situated in King William's Town, and to invest the proceeds on first mortgage.

The Court made the order, subject to the consent of the major heirs.

BEYNDERS V. BEYNDERS.

Mr. Barber asked the Court to make absolute the rule nisi admitting the applicant to sue *in forma pauperis* in an action against his wife for divorce by reason of her alleged adultery.

The Court made the order.

WETZEL V. WETZEL.

Mr. Molteno asked the Court to make absolute the rule nisi for dissolution of the marriage subsisting between the parties by reason of the respondent's failure to obey the order for restitution to his wife of her conjugal rights. An affidavit was put in showing that respondent had failed to return to or receive his wife.

The Court made the rule absolute.

WOOD V. WOOD.

Mr. Buchanan, on behalf of the petitioner, Gertrude W. Wood; applied for leave to sue *in forma pauperis*, and by edictal citation, in an action against her husband for restitution of conjugal rights, failing which for divorce.

Referred to counsel.

IN THE ESTATE OF THE LATE WM. AMBROSE.

Mr. Buchanan moved to make absolute the rule *nisi*, issued under the Titles Registration and Derelict Lands Act, for registration in the name of the executrix of the said estate of certain lot of ground, marked No. 21, situate in Rufane Vale, near Port Elizabeth.

The Court made the order.

ESTATE OF ISMAEL SAFODIEN.

Mr. Juta moved to make absolute the rule *nisi* for the issue to Madoroen Abrahams of letters of administration as executor testamentary to the estate of the said Safodien, who is believed to have been lost in the steamer Deccan, on a voyage from Mauritius to Bombay.

Granted.

HENNINGS V. HENNINGS.

Mr. Currie, on behalf of petitioner, applied for a rule *nisi* requiring her husband to show cause why she shall not be admitted to sue him *in forma pauperis*, by edictal citation, in an action for restitution of conjugal rights, failing which for divorce.

The Court fixed the return day for 31st August, personal service if possible, failing which one publication in the "Bechuanaland News," and one notification in the "Gazette."

DRAKE V. DRAKE.

Mr. Graham applied for the appointment of a commission to take the evidence *de bene esse* of witnesses for the plaintiff in the suit between the parties at Gaberones, British Bechuanaland.

The Court appointed the Acting Resident Magistrate at Gaberones to take the evidence.

Re INSOLVENT ESTATE OF CHARLES TURTON.

Mr. Giddy applied for an order requiring the trustee of the said estate, in terms of section 15 of Act No. 88 of 1884, to forth-

with file the liquidation account and plan of distribution, and that he do personally pay the costs of application.

The Court granted the application, the account to be filed within a month, with costs *de bonis propriis* against the trustee.

LARY V. LARY.

In this matter the return day was extended to the 1st August.

REGINA V. BENSON.

Appeal from the conviction of the accused before the Resident Magistrate of Barkly East on a charge of neglecting to make proper and diligent efforts to clean from scab certain sheep and goats.

As the circumstances were the same as in "Regina v. Theron" (*ante*, p. 168), the conviction was quashed, counsel for the Crown consenting.

Ex parte GLYNN.

1898.
{ July 12th

Insolvency—Marriage in community—Joint estate—Rehabilitation of surviving spouse.

Mr. Jones moved for the rehabilitation of the estate of R. J. Glynn, deceased, and of his surviving spouse, Agnes Glynn. Mr. and Mrs. Glynn were married in community of property. The estate of the former, who died in February, 1881, was sequestrated on the 12th September, 1883, and the latter's on the 7th February, 1884. Mrs. Glynn in her affidavit alleged, *inter alia*, that she was one of her husband's executors, that she had made a full and fair surrender of her estate, and along with her co-executors of the estate of her deceased husband (the said estates being surrendered separately *not* jointly). That she was unable to frame such a balance-sheet as was required by the Rules of Court owing to the death of her husband, who solely managed and looked after the joint estate and who would have been the only person to give the required particulars. That the trustees of the estate were dead, and that she did not know where the books of account relating to the estate prior to the sequestration were to be found.

The Court granted the rehabilitation of the surviving spouse, Mrs. Agnes Glynn.

[Applicant's Attorneys, Messrs Scanlen & Syfret.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

REGINA VS. LYST VORTUIN. { 1898.
July 25th.

Masters and Servants—Act 18 of 1873, section 7, sub-section 4—Contravention—Special J.P. — Imprisonment without option of fine—Sentence quashed on review.

The Chief Justice said this case had come before him as judge of the week from the Special Justice of the Peace for Beaufort West sitting at Quaggasfontein.

The accused was charged with contravening section 7, sub-section 4 of Act 18 of 1873, in that she did, on or about the 9th day of June, 1898, and at Rietfontein, carelessly and improperly perform work which from its nature it was her duty under her contract to have performed carefully and properly. The accused was found guilty, and sentenced to fourteen days' imprisonment.

The Chief Justice remarked that he had requested the Special Justice of the Peace to state why he did not give the defendant the option of a fine as directed by the 4th sub-section of section 7 of Act 18 of 1873.

In reply, the Special Justice of the Peace said: Defendant is a notorious character. She has no respect whatever for law, and defies everybody, telling them it is no punishment to her to be fined, and as margin note of section 2 of Act 80 of 1889 (p. 187 of Tennant's J.P. Manual) sent me by Government mentions that offenders against section 7 of Act 18 of 1873 may be imprisoned without option of fine, I thought a short period of imprisonment would have a more deterrent effect on the prisoner than a fine, and I will very much regret if it be decided that I have erred, but I shall do my best to guard against a recurrence.

The Chief Justice said: The Special Justice of Peace has evidently been misled by the marginal note to section 2 of Act 80 of 1889, which is entirely wrong. No option of a fine having been given, the sentence must therefore be quashed.

WASSERFALL V. WASSERFALL.

Mr. Shell applied for an extension of the return

day to the 1st November, with the same publication as before.

The Court granted the application

Re WOLSTENHOLME'S ESTATE.

Mr. Rubie applied for an extension of time for nine months to the trustee of the said estate, to enable him to investigate the affairs thereof, and to prepare a liquidation account.

The Court extended the time for a further period of six months from this date.

PAXMAN V. PAXMAN.

Mr. Buchanan applied on behalf of petitioner for leave to sue in *forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce.

Referred to counsel.

WICKS V. WICKS

Mr. Searle applied on behalf of petitioner, Anna C. Wicks, for leave to sue in *forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

Referred to counsel.

PRICE V. PRICE.

Mr. Currie applied on behalf of petitioner, Catherine B. Price, for a rule nisi requiring her husband to show cause why she shall not be admitted to sue him in *forma pauperis* by edictal citation in an action for restitution of conjugal rights, failing which for divorce.

The Court granted leave to sue by edictal citation, personal service if possible, failing which one publication in the "South Australian Register," the rule to be returnable on first day of November.

THE SOUTH AFRICAN LOAN AND MORTGAGE COMPANY V. COOPER.

Mr. Molteno applied for the attachment, *ad fundandam jurisdictionem* of this Court, of certain freehold land situated at Rondebosch, being the remaining extent of the estate Rodenburg, in an action to be instituted against the respondent for the recovery of the balance of a mortgage bond. The respondent was now resident in Australia.

The Court made the order, the rule to be returnable last day of November, failing personal service one publication in the "Government Gazette."

HEYDENRYCH V. FARMER.

Mr. Rose-Innes, Q.C., for the applicant (defendant in the action), moved for the appointment of a commission to take his (defendant's) evidence *de bene esse* in London.

Mr. Juta, for the respondent (plaintiff in the action), opposed the granting of the present application until inspection had been given of certain documents in the defendant's possession, with a view to his cross-examination.

The plaintiff obtained an order for discovery and inspection. The documents which the plaintiff wished to inspect are in London in the hands of the Alliance Bank, but the defendant's attorneys alleged that copies were at present on the way out from England.

Counsel having been heard on the affidavits,

The Chief Justice said: The Court will grant the order for the appointment of a commission, to be suspended, however, until seven days after the plaintiff shall have had an inspection of the documents mentioned by the defendant in his affidavit of discovery and not yet inspected by the plaintiff.

Mr. Mackarness, barrister-at-law, was appointed commissioner. The question of costs to stand over.

Re JOHNSON'S ESTATE. { 1898.
July 26th.

Will—Landed property—Restraint upon alienation—Mortgages—Sale—Executors.

Mr. Rubie applied for authority to the executors to sell a certain piece of land situate in William-street, Cape Town, and to devote the proceeds to the reduction of mortgages on other properties in the said estate.

The deceased was at the time of his death the owner of a certain piece of land with the buildings thereon, situate in Cape Town in William-street, being one half of Lot 18. Owing to the sloping position of the northern side of the property, a serious nuisance, in the form of accumulated drainage and surface water, exists at present, and the owner of the adjoining property has called upon the executors to abate the same and threatened legal proceedings. The executors alleged that there was no way of abating the nuisance except by either pulling down the houses on the property or by leading a drain across the adjoining property, to which the owner objected but offered to buy the land for the sum of £112 10s. The deceased by his will prohibited the alienation of any part of his landed property until such time as the youngest of his children should attain the age of 21 years. Having regard to the above restraint upon alienation, the

executors now asked for the authority of the Court to sell the property for the sum offered. The two minor children of the deceased consented to the proposed sale. The matter was referred to the Master and he recommended that the property should be sold and the purchase money devoted to the reduction of the mortgages on the other properties in the estate.

The Court granted an order authorising the sale of the property for the purpose of paying off part of the mortgages existing on the entire property of the deceased.

[Applicant's Attorney, W. E. Moore.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G., (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

BLAKE V. KRIEL. { 1898.
Aug. 1st.

Mr. Maskew moved for provisional sentence for £6 16s. 11d., with interest at 6 per cent. to the 9th November, 1892, on a promissory note dated 9th August, 1892.
Granted.

BLAKE V. VAN DEN HEEVER. { 1898.
Aug. 1st.

Provisional sentence—Promissory note—Defence—Non-completion of contract in respect of which the note was given—Conditional life insurance policies.

Mr. Juta moved for provisional sentence on a promissory note for £26 6s., with interest at 6 per cent. from the due date, dated 23rd May, 1892, and payable on the 23rd August, 1892, made and signed by the defendant to and in favour of A. W. Beck, and by him endorsed in blank, the plaintiff being the legal holder of the note.

It appeared from affidavits sworn to, by and on behalf of the plaintiff, that on the 8th June, 1892, the conditional policies on the lives of the defendant and his wife were posted direct to the defendant and were accepted by him as they were not returned to the Assurance Company. That the conditional policies so accepted by the defendant distinctly insured the lives for four months. That

a conditional policy in the Equitable Life Assurance Society of the United States is a complete policy, as it insures a life for four months and until the final policy is received from the head office in America, the final policies being always delivered within four months from the date of the conditional policy. That the final policies on the lives of the defendant and his wife were posted at Cape Town under registered covers to the defendant and his wife on the 14th September, 1892, but the same were returned to the company by the Post Office Department with the word "Refused" endorsed on the cover of the policies. That when the note sued upon was made in favour of Beck he was then a sub-agent under the plaintiff, who was a district manager of the Equitable Life Assurance Society of the United States. That Beck had left the employment of the plaintiff and that his whereabouts could not be ascertained. The plaintiff further alleged that he believed that Beck did not agree that completed policies would be delivered to the defendant before the due date of the promissory note in question.

Mr. Searle opposed the application, and read the defendant's affidavit, in which he alleged that on the 28rd May, 1892, he signed an application to have his life and his wife's insured with the Equitable Life Assurance Society of the United States. That the agent (Beck) of the said society told him that the premium on his life would be £12 8s., and that on the life of his wife £18 8s., that the said agent further agreed to take defendant's promissory note, payable on the 28rd August, 1892, it being specially agreed that before that date the completed policies should be delivered to him (defendant).

That he had never received the completed policies, but only a conditional one on his own life.

That after the due date of the promissory note, he again saw the society's agent (Beck), and gave him notice that as the society had failed to deliver the policies according to the special agreement, defendant would consider the contract cancelled, and that on account of the society's delay he (defendant) had already insured in another company. That the promissory note given as above amounting to £25 6s. was given for the first year's premium on the policies of himself and his wife.

That the society failed to complete their contract, and that, therefore, he was not indebted to them in the amount of the promissory note sued on.

Mr. Searle for the defendant contended that as the contract had not been completed within the stipulated time, there had been a failure of the consideration for which the note was given and that provisional sentence should be refused.

The Court granted provisional sentence.

The Chief Justice said: The note sued upon is an unconditional promise to pay, and, therefore, *prima facie* the plaintiff is entitled to judgment. #

The defence set up is that at the time the note was given it was specially agreed that before the due date a certain completed policy of insurance would be delivered. That on the face of it seems most improbable, because the promissory note was only for three months, and the provisional policy covered a period of four months, and it seems very unlikely that such a condition would be attached. It is said that this promise was made by one Beck. Beck is not to be found, so that it is easy to make that statement. I think, on the whole, the probabilities are entirely against the defence set up, and, therefore, the Court will give provisional sentence as prayed with costs.

[Plaintiff's Attorneys, J. O. Berrangé & Son; Defendant's Attorney, G. Montgomery Walker.]

BLAKE V. LE ROUX.

Mr. Juta moved for provisional sentence for £5 12s. 8d. on a promissory note, premium on a life policy.

The Chief Justice said it was quite a new development in life insurance to take promissory notes for premiums. There was nothing, however, in law opposed to it.

Mr. Juta said the agent had to pay the company in cash, and was personally liable for the amount of the premiums.

Provisional sentence was granted with costs.

BATTENHAUSEN V. RABIE.

Mr. Shippard moved for provisional sentence for £180 on a mortgage bond.

Granted.

SMITH V. DU TOIT.

Mr. Shell moved for provisional sentence on a promissory note for £850, with interest from the due date.

Provisional sentence was granted against the sureties with costs.

ARMSTRONG V. MALCOLM.

On the motion of Mr. Graham, the final adjudication of the defendant's estate was decreed.

THE MASTER V. MALEEK'S EXECUTOR.

On the motion of Mr. Giddy, the defendant was ordered to file his account. *Costs de bonis propriis.*

ADMISSION—*Ex parte* SONNENBERG.

On the motion of Mr. Buchanan, Mr. M. C. Sonnenberg was admitted as an attorney, notary, and conveyancer; the oaths to be taken before the Resident Magistrate of Port Elizabeth.

REHABILITATIONS

On motion from the bar, the rehabilitation of the following insolvents was granted: A. S. C. Venter, W. P. Louw, Alfred Nicholson, George Birch, and C. F. W. Gierke.

ABRAMS V. ABRAMS. { 1898.
Aug. 1st.

This was an action for restitution of conjugal rights, failing which for divorce, on the grounds of the defendant's malicious desertion.

The declaration alleged that the parties were married at Wynberg on the 16th August, 1886; that there was issue of the marriage a daughter, now aged seven; and that in April, 1888, the defendant wrongfully and unlawfully deserted the plaintiff, and refused, and still refuses to restore to her her conjugal rights.

The plaintiff claimed:

(a) An order compelling the defendant to restore to her her conjugal rights and to return to and cohabit with her, and failing compliance with such order,

(b) A decree of divorce.

(c) Custody of the child and costs of suit.

Mr. Sheil appeared for the plaintiff; the defendant was in default.

Mr. Norman Lacy, of the Colonial Office, produced the original marriage certificate.

The plaintiff having given evidence in support of her declaration,

The Court granted a decree of restitution of conjugal rights, the defendant to return to or receive his wife on or before the 15th October, failing which, to show cause on 1st November why a decree of divorce should not be granted.

DRAKE V. DRAKE. { 1898.
Aug. 1st.

This was an action for divorce instituted by Mr. E. J. Drake against his wife by reason of her adultery.

Mr. Searle appeared for the plaintiff; the defendant was in default.

Evidence of the adultery having been given, a decree of divorce was granted with costs.

GRAHAM V. GRAHAM. { 1898.
Aug. 1st.

This was an action for restitution of conjugal rights, failing which for divorce, on the grounds of the defendant's malicious desertion.

The declaration alleged that the parties were married in London on the 80th April, 1890, that there had been no issue of the marriage, and that in October, 1892, the defendant deserted the plaintiff. The prayer was for a decree of restitution of conjugal rights with costs.

Mr. Graham appeared for the plaintiff; the defendant was in default.

Mrs. Beatie Graham (*née* Freeman), the plaintiff, deposed that she was married to the defendant on the date above mentioned. They resided for a year in England after the marriage. Three months after the marriage she found the defendant had deceived her, giving her to understand that he had been a bachelor before marrying her, whereas he had been twice previously married, one of his wives being dead and the other divorced. He treated her well for some time, but he afterwards took to drink and ill-treated her. They came to the Colony in October, 1891, with the intention of remaining. They remained for a few weeks at the Royal Hotel, Cape Town, and then went to Kimberley. She accepted an engagement with Searelle's Company at her husband's request, as he had run short of means. She had been on the stage before she was married. She toured about the Colony and the Transvaal, and fell ill in Johannesburg, where she was three months in hospital. Her husband did not support her. She saw her husband last in Durban on October 6 last. She was then going on tour to East London, where her husband was to join her on receipt of a remittance from England. While in East London she received a note from her husband in these terms: "My Darling Wife,—Good-bye. If you want anything, write to G. F. Fowler. God bless you." She had made every effort to ascertain her husband's whereabouts without avail. She had been touring about the country ever since. She was willing to return to her husband. There were no children of the marriage.

The Court granted a decree of restitution, the defendant to return to his wife by October 15, failing which to show cause by 1st November why a decree of divorce should not be granted with costs. The rule should be sent by post to G. F. Fowler, so that, if possible, it might reach the defendant.

CAPE OF GOOD HOPE BANK, 1898.
LIMITED. { Aug 1st.

Mr. Innes, Q.C., moved for the sanction of the Court to certain compromises proposed to be effected by the official liquidators with shareholders and debtors.

The application was granted.

The following is the list of compromises :

W. A. Amyott, Kimberley, £366 17s. 5d. (debtor), offers £50, which has been paid.

C. A. J. Burger, Potchefstroom, £80 0s. 4d. (debtor), offers 8s. in the £, which has been paid.

J. P. Burger, Potchefstroom, £80 0s. 4d. (debtor), offers 8s. in the £, which has been paid.

Rev. W. Cruijkshanks, Klerksdorp, £1,804 6s. 6d. (debtor), offers £20, which has been paid, and all securities in the bank's possession.

J. Finkel, London, £5,377 (debtor), offers £250, deposited in the London and Westminster Bank, in the joint names of J. Finkel and the liquidators' agents, and all scrip in the bank's possession, they to surrender his life insurance policy for £1,000, on which two premiums only have been paid.

G. M. Huntly, Vryburg, £355 17s. 10d. (debtor), offers £100, of which £70 has been paid, and all securities in the bank's possession, the release being conditional on the due payment of the £80.

H. J. Louw, Pretoria, £251 2s. (debtor), offers £20, which has been paid.

Mrs. A. W. Naudé, Graaff-Reinet, £900 (shareholder), offers £500, in consideration of which the official liquidators are to cancel the second bond for £900 which they hold over her property in Graaff-Reinet, the release to be conditional on the due payment of this amount. The property is valued at between £700 and £800, and there is a first bond on the same for £250.

J. O. Noonan, Potchefstroom, £967 11s. 10d. (debtor), has voluntarily given power of attorney to sell out of hand his property at Potchefstroom, which is bonded to the bank, in consideration of which he is to receive a full release.

J. H. Scrutton, Johannesburg, £4,404 9s. 10d. (debtor), offers £200, which has been paid, and all securities in the bank's possession.

H. L. Stables, £900 (shareholder). This person, who is believed now to be residing at Athens, has offered through his attorneys in this colony the sum of £200 in full satisfaction of his liability. This £200 is deposited in the East London branch of the Standard Bank, in the joint names of the official liquidators and Mr. Stables, attorney. No affidavit as to Mr. Stables's position has been obtained, nor does he reply to letters.

A. Suffert, Port Elizabeth, now residing in Germany, £200 (debtor), offers £50, which has been paid.

Re OCTAVIUS C. JUDD, MINOR.

Mr. Giddy moved for authority to the Master to pay out from the amount to the credit of the minor in the Guardians' Fund a quarterly allowance to defray the cost of his maintenance and education.

Mr. Justice Buchanan: The order will be that the Master pay out such sum, not exceeding £20 per quarter, as he may deem necessary.

FRANCOIS J. P. MARAIS, A LUNATIC.

Mr. Jones moved for the sanction of the Court to a subdivision proposed to be effected by the curators of the property of the said lunatic and others, whereby he will receive an undefined one-third share or portion of the farm Wolvedrift, in the division of Robertson, in exchange for his present undefined 5-86th part of the whole.

Order granted.

EAST LONDON LANDING AND SHIPPING COMPANY.

Mr. Graham moved for an order on the final report of the official liquidators directing that the company be dissolved, and that authority be given for the destruction of the books and documents relating thereto.

Order granted.

Re ROBERTS'S INSOLVENT ESTATE.

On the motion of Mr. Searle, the account in the estate was confirmed—respondent to pay the costs of the original application.

WILLIAMS V. WILLIAMS. { 1898.
{ Aug. 1st.

This was an action for restitution of conjugal rights, failing which for divorce, by reason of the defendant's malicious desertion.

Mr. Tredgold appeared for the plaintiff; the defendant was in default.

The plaintiff, John Williams, sanitary inspector, Rondebosch, deposed that he was married at Kimberley in 1886. He lived eight months with his wife, and then from what he had heard he sent her home to her parents in Knysna, contributing £4 a month for her support. She remained there fourteen months and came back to Kimberley, where he had an interview with her and made an appointment for the next evening, with a view to setting up their home again. He did not see her afterwards, and was informed that she went to Bechuanaland with a man named Transfeldt. There was a child of the marriage, who was living with plaintiff. He was prepared to receive his wife if she

would come back, but he had received a letter from her on July 19 saying she had received the notice of the Court and did not intend to come.

A decree was granted for the restitution in the same terms as in the other cases, plaintiff to have the custody of the child of the marriage.

HALL V. WATKINSON'S TRUSTEE.

Mr. Buchanan moved for the personal attachment of the respondent for contempt of Court in failing to file an account of his administration and proposed distribution of Watkinson's insolvent estate as directed by order of this Court on 1st June last, and further that he do pay the costs of this application *de bonis propriis*.

The Court ordered the respondent to be attached for contempt of Court, unless he purged his contempt, and to pay the costs of this application *de bonis propriis*.

MEYER V. SCHOEMAN AND OTHERS.

Mr. Juta moved to make certain agreement or compromise entered into between the parties in respect of the farm De Kango, in the district of Oudtshoorn, a rule of this Court.

Mr. Watermeyer appeared for the respondents, and consented.

Mr. Justice Buchanan: The interdict may be discharged, and the agreement between the parties made a rule of Court, the order not to apply to parties not before the Court.

CADLEY V. CADLEY.

Mr. Graham moved to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights, and for an order giving to applicant the custody of the minor child.

The order was granted.

Re SMUTS MINORS.

Mr. Graham moved for authority to the Master to pay out from the amount standing to the credit of the minors in the Guardians' Fund an allowance to enable them to continue their studies, and also to satisfy the deficiency shown by an account filed by the tutors for the past year.

The order was granted in terms of the Master's report.

*GOUWS V. GOUWS AND ROBINSON { 1898.
Aug. 1st.

Mutual will—Landed property—Restraint upon alienation—Proposed sale to strangers—Interdict—Costs.

This was the return day of a rule *nisi* which operated as an interdict, granted by the Hon. Mr. Justice Upington in Chambers on the 17th June last, calling upon the respondent, Jury Hendrik Gouws, to show cause, if any, why he should not be restrained from passing transfer to the respondent William Robinson, of his undivided share in certain farms, or landed property, known as "Breeleegte," "Zwart Rivier," and "Boschrug," situated in the division of Jansenville, formerly Uitenhage, transferred to the said Jury Hendrik Gouws and others on the 17th May, 1882.

The facts upon which the rule was granted are as follows:

The applicant was one of the heirs of the late Cornelis Francois Gouws and Magdalena Johanna Aletta Gouws, who are both dead. According to the mutual will of the parties (Gouws, sen., and his wife) executed on 3th May, 1858, the landed property in the estate was bequeathed to the children of the testators in equal shares, or to their descendants *per stirpes* in succession under the express condition that none of the heirs should have the right to sell his or her share to any stranger before first having offered it to the other heirs as co-proprietors. Transfer in the names of the different heirs was effected of the landed property, including "Breeleegte," "Zwart Rivier," and "Boschrug," situate in the division of Jansenville, without mentioning the stipulation set forth in the will. The first-named respondent, married to one of the heirs, received transfer of a portion in the undivided property, including "Breeleegte," "Boschrug," &c., which he sold to the second-named respondent. The applicant and the joint proprietors of "Breeleegte" and "Boschrug" were anxious to purchase the portion transferred to the first respondent. The applicant alleged that the first-named respondent, although well knowing the conditions and stipulations of the will, had not offered his share in the properties to the applicant or to the other proprietors of the land, and they protested against the transfer to Robinson and desired a *caveat* to be laid in the Deeds Office against the passing and registering of such transfer.

Mr. Searle now appeared for the applicant and moved that the rule *nisi* be made absolute.

* Before Mr. Justice Buchanan and Mr. Justice Upington.

Mr. Rose-Innes, Q.C., appeared for the respondents and read their affidavits.

Robinson alleged that part of Breeleegte, in extent about 648 morgen, which he had bought from the first-named respondent, had been purchased by the latter from one Slabbert, and was not in any way affected by the will.

That he (Robinson) had no knowledge of the condition contained in the will, and that he had been informed that several of the heirs had sold their portion to strangers and never recognised the condition contained in the will.

The respondent Gouws alleged that he was married in community of goods to a daughter and heiress of the late Cornelis François Gouws, who died in 1887. That in 1882 the late C. F. Gouws transferred to him (respondent) and others, in undivided shares, the following properties: one-fourth share in the farm Breeleegte and the farms Boschring, Zwart Rivier, Tweekop, and Rietkuil. That in and before 1882 the said C. F. Gouws also owned the farm Uintjes Vlakke. That at the time when the properties were so transferred the wife of the late C. F. Gouws was dead, and the properties were transferred under the following circumstances: C. F. Gouws proposed to respondent and all the other persons to whom the properties were transferred that they should consent to his selling Uintjes Vlakke for his own benefit, and that they should pay him certain sums of money, in consideration of which he would give them clear title without any restrictions. That the respondent and the other persons to whom the properties were transferred agreed to the proposed arrangement, and the properties were transferred accordingly without any restrictions as to the disposal thereof by any one.

In proof of the foregoing allegations the respondent alleged that sales did take place of shares in the said properties without any restriction or supposed restriction being spoken of or recognised by any of the sellers or purchasers and that the applicant himself was a purchaser of one share.

In answer to the above affidavits the applicant alleged that C. F. Gouws sold the farm Uintjes Vlakke with the consent of the applicant and of the other major heirs to the mortgagee for the amount of his bond. He denied that he consented to the arrangement referred to in the first respondent's affidavit, or that he was aware that any of the other major heirs had consented to it.

As to Robinson's affidavit he admitted that the portion of Breeleegte which had been purchased from Slabbert was not subject to the joint will.

Mr. Innes, Q.C., urged that if the rule were made absolute, costs should not be given against Robinson, who was ignorant of the condition contained in the will and who, if an action were

brought, would submit it to the judgment of the Court.

Mr. Searle was not called upon.

So much of the interdict as referred to the 648 morgen of Breeleegte was discharged. The interdict was made absolute as to the rest of the property with costs, with leave to either respondent to bring an action to set it aside.

[Attorneys for the Applicant, Messrs. Fairbridge & Arderne; Attorneys for the Respondents, Messrs. Van Zyl & Buissinné.]

*Ex parte RAUTENBACH. { 1893.
Aug. 1st.

Minor—Interest in landed property—Sale authorised.

Where it was clearly for the benefit of a minor the Court authorised the sale of his shares in certain farms; the Master having reported in favour of the sale.

This was an application for an order approving of the sale, and authorising the transfer of the petitioner's and his minor sons' shares in certain farms under the following circumstances:

The petitioner's father and mother by their joint will bequeathed to the petitioner and his brother in equal shares a certain perpetual quitrent farm called Douwkom's Kraal in the division of Humansdorp, and also a certain piece of perpetual quitrent land called Hlands Kloof in the same division, under the stipulation that the petitioner and his brother should pay into the general estate of their parents the sum of £750, and that neither the petitioner nor his brother should have the right to alienate to strangers their respective shares in the said farms without the consent of the other. The properties were transferred to the petitioner and his brother, but on the first-mentioned farm a mortgage bond existed for £800 granted by their father to the South African Association on the 29th April, 1858. In the year 1869 the petitioner married in community of property, and on the 7th April, 1882, he and his wife executed a mutual will, by which the survivor of them and the children of the marriage were appointed heirs of the joint estate with the exception of a certain share in the farm "Patentie," situate in Gamtoos River in the division of Humansdorp, which, on the death of the survivor, was to devolve on the child or children of the marriage. The petitioner's wife died on the 9th May, 1884, leaving one child of the

* Before Mr. Justice Buchanan and Mr. Justice Upington.

marriage, a son, now nine years of age. The petitioner, by virtue of his marriage in community, was entitled to one-half of his one-half share in the farm Douwkoms Kraal and Elands Kloof and by the mutual will of himself and his wife to a child's portion thereof, or to three-eighths of the whole, his minor child being entitled to one-eighth thereof. The Divisional Council valuation of the whole of the farms Douwkoms Kraal and Elands Kloof was alleged to be £1,500. The petitioner sold his and his minor son's shares in the farms for £910, out of which he expended £500 in improving the farm "Patentie," a share of which was bequeathed to his minor son who was secured by a "kinderbewys", the balance being devoted to the liquidation of the debts of the joint estate of the petitioner and his wife. The petitioner and his brother were still liable for the amount of the mortgage bond for £800 before referred to granted over the farm Douwkoms Kraal. The petitioner alleged that the sale of his and his minor son's shares of the farms Douwkoms Kraal and Elands Kloof had been greatly to the advantage of the minor, as the expenditure of the £500 on the farm Patentie had added largely to the value of that farm and to the minor's share in it, the annual rental having been increased in consequence of such expenditure from £80 to £180. The petitioner's brother consented to the sale and the purchaser had called upon the petitioner to pass transfer. The petitioner prayed the Court to be pleased to grant an order approving of the sale and authorizing the petitioner to pass transfer of his own and his minor son's shares of the farms of the purchaser.

The matter was referred to the Master and he reported that in the liquidation account of the petitioner and his deceased wife, filed in 1884, the value of his then reversionary right to the farms was brought up at £200. That he had framed a supplementary account, in which the difference between that amount and the sum for which the farms had been sold was brought up, and a further sum of £88 16s. was awarded to the minor.

The Master stated that he saw no objection to the application being granted, on condition that the petitioner passed a second mortgage on his own farms Patentie and Roodewal in favour of his minor son for the sum of £88 16s.

Mr. Graham was heard in support of the application.

Mr. Justice Upington: I view with great suspicion applications of this nature.

Mr. Justice Buchanan: As the Master appears to have made full inquiries into the matter, the application will be granted in terms of his report.

[Applicant's Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

BEVERN V. BEVERN. { 1893.
Aug. 2nd.

This was an action for divorce instituted by Mrs. Violette Agnes Bevern against her husband, Mr. Alfred Bevern (at present confined in the Cape Town gaol awaiting his trial on a criminal charge), on the grounds of adultery.

The declaration alleged that the parties were married at Claremont on the 15th March, 1887.

That there were three children of the marriage. That in the years 1892 and 1893, but more particularly in the months of May and June, 1893, the defendant committed adultery with one Mary Chambers and others.

The plaintiff claimed:

- (a) A decree of divorce.
- (b) Custody of the children.
- (c) Costs of suit.

Mr. Molteno appeared for the plaintiff; the defendant was in default.

Mr. Norman Lacey, of the Colonial Office, in charge of the marriage register, produced the original certificate of the marriage between the plaintiff and defendant.

Violette Agnes Bevern, the plaintiff, deposed that she was married to the defendant on the date above mentioned. Her husband had always treated her kindly, and the first trouble she had had with him was that he stayed away from home three days and three nights on the occasion of the Queen's Birthday this year. After that he frequently came home late in the evening, but always had some excuse about being detained at business, or something of that sort. She, however, suspected him, because on some occasions when she went to meet him about nine or half-past she found the store looked up, and yet when he came home he said he had been detained at business. She remembered the night when her husband attempted to leave Cape Town for Australia, accompanied by Mrs. Chambers. She herself went down to the Central Jetty, and prevented them going. During the last few days she had received a letter from her husband, in which he wrote, "I have never been cruel or unkind to you, but unfaithful, and that was through bad companions and drink," and in which he signed himself, "yours affectionately but unfaithfully."

The Chief Justice asked if the plaintiff were

granted the custody of the children how she proposed to maintain them.

Mr. Molteno said that Mr. Bevern's mother in England would very probably assist to provide for the children.

The Chief Justice: Has the defendant no means?

Mr. Molteno: No, he is insolvent

Henry A. Hamilton, proprietor of the Belle Ville Hotel at D'Urban-road station, said the defendant, accompanied by a Mrs. Bevern, had stayed at his hotel six or seven times. The lady, whom he had understood to be Mrs. Bevern, was not the plaintiff, but, as he afterwards found out, Mrs. Chambers. They came during the latter part of May and June, and once in July, and usually left about ten in the evening. They occupied the same bedroom, and on one occasion, when he was outside the hotel, seeing a light in one of the front bedrooms and not knowing that there were any visitors, he looked through the window and saw two persons, whom he took to be the defendant and Mrs. Chambers, in bed together.

Joseph Henry St. Leger Harvey, headwaiter at St. George's Hotel, stated that he was previously at Nathan's Hotel at Camp's Bay, and that about the 22nd or 24th May of the present year the defendant, with a short stout lady whom he afterwards learned was Mrs. Chambers, visited the hotel, and occupied the same bedroom.

The Court granted a decree of divorce, with costs, the plaintiff to have the custody of the children, with liberty to the defendant to apply to have the custody of one or two of the children if he desired.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

ESTERHUYSEN V. ESTERHUYSEN { 1898.
AND GREEF. { Aug. 2nd.

Adultery—Action for divorce—Collusion.

This was an action for divorce instituted by Mr. J. H. J. Esterhuysen against his wife on the grounds of her adultery with the second-named defendant, against whom £1,000 damages were claimed.

The declaration alleged that the plaintiff and the first-named defendant were married in community of property on the 28th January, 1878; that there was issue of the marriage five children, all minors.

That the first-named defendant committed adultery with the second-named defendant on various occasions and at different places between May, 1889, and January, 1898.

The plaintiff claimed as against the first defendant:

- (a) A decree of divorce.
- (b) Custody of the children.
- (c) Forfeiture of the benefits arising from the marriage in community.

The claim against the second defendant was for (a) £1,000 damages, with cost of suit.

The plaintiff's wife filed no plea, but appeared in person to defend the action.

Greef in his plea denied the charge of adultery, and prayed that the plaintiff's claim might be dismissed with costs.

Mr. Rose-Innes, Q.C., and Mr. Currey appeared for the plaintiff, and Mr. Juta and Mr. Searle for the co-defendant Greef.

Johannes H. J. Esterhuysen (the plaintiff) stated that he entered the defendant's service on the 12th May, 1889, at Kareebosch, and since then he had moved about from one to another of the defendant's farms, looking after his sheep. When there was a house on the farm he occupied it, when not he lived in a tent. All that time he had no suspicion of his wife's misconduct. On the 7th of January last he found in his wife's work-basket a letter, dated the 3rd January, addressed to Greef. The letter was couched in very endearing terms, and admitted that she had cohabited with him for two years and eleven months. He saw his wife about the letter on January 7, up to which time he had no suspicion regarding her conduct. He showed her the letter and at first she made no reply, and then said afterwards that if he promised not to send her away or ill treat her she would tell him what the letter meant. He made no promise, and she told him she lived two years and eleven months with Greef. He went at once to Mr. Wilmot, agent, and put the matter in his hands. His wife confessed her adultery. The youngest child was more than a year old. He claimed the custody of the children, except the youngest child.

Cross-examined by Mr. Juta: He came to Cape Town yesterday from Laingsberg in the same train with his wife. He stayed at Mrs. Hofman's boarding-house, 81, Napier-street. His wife stayed in that house also, but not with him. His wife and he had dinner together last night and breakfast to-day. There were two bedrooms in his house at Laingsberg. During May, June, and July he did not cohabit with his wife. When visitors stayed at his house he gave them his room and slept outside. He never accused a man named Barker of impropriety with his wife. About January, 1898, Mr. Greef pressed him for payment of £180, which he owed him. He denied that he wrote the two letters produced with reference to that debt.

The Chief Justice said the handwriting in the

letters was similar to that in the wife's letter of January 8.

Cross-examination continued : Between January and April, he had no communication with Mr. Greef. He got a summons for £45, and went to Worcester to settle it with Greef, but did not say anything about this charge. He paid the £180 at Worcester afterwards. He had not the envelope of the letter written by his wife to Mr. Greef.

David Kook deposed to witnessing adultery between Mr. Greef and Mrs. Esterhuysen in the winter of 1889.

F. W. B. Wilmot, agent, and Special Justice of the Peace at Laingsberg, deposed that Esterhuysen came to him on January 7. He subpoenaed Kook because of reports which he had heard.

M. Esterhuysen, aged fourteen, daughter of the plaintiff, deposed that Greef and her mother had spent a considerable time on one occasion in her mother's bedroom. She told her father of the circumstance before the discovery of the letter.

J. T. Luyt deposed to having called at the plaintiff's house on one occasion and to his seeing the bedroom door closed, and a horse standing outside. He spoke to the last witness about the matter at the time.

Mrs. Esterhuysen, the first-named defendant, admitted in examination by the Court that she had committed adultery with the co-defendant, and that she had written the letter which was found by her husband in her basket, and that the contents of the letter were true. In cross-examination, she said that Greef seduced her the second time she saw him. He was then sixty-six years of age. She came up from Laingsberg with her husband, who paid for the return tickets. She intended going back there with him, but would live with her brother, near Laingsberg. He had no house, but they would live in a tent for a while, when she would go back to her parents. Her husband had given her no money for support during the last six months.

Johannes Adolf Legrange, field-cornet in the Prince Albert district, was examined for the defence, and deposed that he was frequently in the plaintiff's house at Laingsberg. In April last he slept in one room and Esterhuysen slept in the other bedroom with his wife. On other occasions he had sat down there to meals with plaintiff and his wife, and he noticed no difference in their demeanour. Greef was an old man, and at present very ill.

By the Court : He was always considered a man of good character and respectable.

Cross-examined by Mr. Innes : He was a friend of Greef's, and had business dealings with him. He told young Mr. Greef of what he had seen at Laingsberg.

Robert Andrew Barker, of the Mounted Police, stationed at Matjesfontein, stated that he was at

Laingsberg on 27th April, and stayed at Esterhuysen's house. Esterhuysen slept in the same room with his wife. Husband, wife, and children took their meals together, and he noticed no coldness in their behaviour to each other.

Johannes P. J. Plessis, Laingsberg, was also examined to show that there was no difference in the relations of Esterhuysen and his wife after the date of the former's discovery of his wife's alleged infidelity.

Dr. George William Ford, Worcester, deposed that Greef was in a very critical condition, and might die at any moment from Bright's disease.

James Douglas Logan, Matjesfontein, deposed that Esterhuysen was at one time his overseer, and became indebted to him.

Mr. Innes objected to the examination of this witness, on the grounds that the question asked Esterhuysen in cross-examination by Mr. Juta was irrelevant to the issue, and he was bound by the answer. He could not bring evidence now to contradict that answer.

The Court sustained the objection.

Wilhelm Jacobus Esterhuysen, a cousin of the plaintiff, gave similar evidence to that of Plessis.

The evidence, taken on commission, of Greef the co-respondent, was then read. He stated that he was sixty-eight years of age, and had been married for forty one years to his present wife Esterhuysen was in his service for three years, leaving in March, 1892. He gave him (Greef) a promissory note for the sheep which he bought for £188, for which amount he obtained judgment in the Supreme Court. He denied that he committed adultery with Mrs. Esterhuysen, or that he was ever guilty of undue familiarity which would give rise to such suspicion. He had never heard of this charge until he demanded payment for the promissory note.

Mr. Innes, Q.C., was heard for the plaintiff

Mr. Juta was not called upon.

The Chief Justice, in delivering judgment, said : I am sorry to say that in my opinion this case is not a *bona-fide* action against his wife, and the sole object of this action is to recover damages from the co-defendant, who is supposed to be a wealthy man. In my opinion this is a trumped-up charge arranged between the husband and wife, that this letter was not a *bona-fide* letter, and never was intended to be sent to the co-defendant, but that it was written for the purpose of this action. Ignorant and uneducated as these people may be, this is not such a letter as the woman would have written if it was really a *bona-fide* letter, intended for Greef's eyes alone. She would not then have thought of reminding him of the exact number of years and months and days they had been cohabiting together. I am quite satisfied, taking all the circumstances into consideration, that

this is not the kind of letter she would have written if there really had been the fondness she said existed between her and Greef. I, therefore, dismiss entirely her evidence from the case. The little girl's evidence does not carry the case much further. On one occasion she says she saw her mother and Greef enter her mother's bedroom together and remain there for some time. She says she told her father about this before he found the letter addressed by her mother to Greef, whereas her father says he first heard of his wife's adultery with Greef through the discovery of the letter in his wife's work-basket. As to the man Kook, I do not believe his evidence at all. He gives a circumstantial account of what happened at the river, and says he saw the defendants in the act of adultery, that he was within four yards of them and they did not notice him. They must surely have noticed him at that distance. Another reason why I question his evidence is that he says he never informed anyone of what he had seen until he spoke to Mr. Wilmot. That must be wholly untrue, because Mr. Wilmot must have heard the evidence Kook could give before he saw him. These are the witnesses upon whose evidence depended the proof of adultery. As that evidence has wholly failed, I am of opinion that adultery has not been proved. But assuming for one moment that adultery had been proved, this is certainly not a case in which more than nominal damages would have been given. The object of this kind of action for damages is to compensate the husband for the loss of his wife's society. There has not been any such loss here. I believe the husband and wife lived together as husband and wife since the date of the discovery of the letter the same as before. I do not believe the evidence that they have not cohabited. The few persons who slept in their house since January, 1893, state positively that they slept in the same room. I fully believe the evidence of Legrange, that on the occasion when he slept there the plaintiff slept in the same room with his wife. Under these circumstances, leaving aside for a moment the question of collusion, there has not been the loss of *consortium*, and the plaintiff would not be entitled to more than purely nominal damages. But no damages will be given, as upon the main question, whether or not adultery was committed, we are of opinion that no adultery was committed, and the result will be judgment for the defendant with costs.

Mr. Justice Buchanan: I concur in the judgment, and I say that, sitting here as a juror, I am of opinion that no adultery was committed. Under all the circumstances disclosed, I fully agree with the Chief Justice, and if adultery had been proved this is not a case for damages.

Mr. Justice Upington: I am fully of the same opinion.

Judgment was accordingly entered for the defendant with costs.

Plaintiff's Attorneys, M. Sara. Fairbridge & Arderne; Defendant's Attorneys, U. C. de Villiers.]

In re KNOOP. { 1898.
{ Aug. 8rd.

Aliment of indigent parents—Lunatic son.

A child who has more than sufficient means for his own support is legally bound to provide for the aliment of his parents who are in distress and unable to work, and this obligation may be enforced by a father against the estate of his son who has been declared a lunatic by order of the Court.

This was the petition of Johannes Nicolaas Knoop, seventy-four years of age. The petitioner's son, J. N. Knoop, jun., ten years ago was declared of unsound mind, and incapable of managing his own affairs.

The sum of £4,100, belonging to the lunatic, was at the date of the petition in the hands of the Master, from part of the interest on which amount the lunatic was maintained, the balance being allowed to accumulate.

The petitioner alleged that he was the sole heir of the lunatic, that he was no longer able to earn his livelihood, that he was feeble and sickly, and required comforts which he was unable to obtain, and that for the past two years he had lived on the charity of a friend, who, through adverse circumstances, had become insolvent.

The petitioner prayed the Court to direct the Master to grant him the sum of £8 per month for his support and maintenance out of the moneys in the Master's hands belonging to the lunatic.

The matter was before the Court (in Chambers) on the 25th July last, when it was ordered to stand over for the purpose of ascertaining whether the lunatic had any other heirs except his father, the petitioner; and also for the consideration of the legal question as to the liability of a child to support his indigent parent.

Mr. Juta now appeared for the petitioner, and read his sister-in-law's affidavit, from which it appeared that the only other heirs of the lunatic were four half-brothers and sisters. These latter consented in writing to the present application being granted.

The Master reported *inter alia* that the annual interest on the lunatic's capital amounted to £188, of which £128 were paid for his maintenance, &c., leaving available surplus interest of £60 per annum.

Mr. Juta, on the legal point reserved for consideration, cited *Voet* (25, 8, 8).

The Court granted the application.

The Chief Justice said: The obligation of parents to provide aliment for their children until the latter are able to maintain themselves, has frequently been recognised by this Court. The obligation to protect a child against want may revive even after such child has reached an age at which he can maintain himself, if he is in distress and unable to work through bad health, and if the parents are possessed of the requisite means. (See *Digest* 25, 8, 5, section 7, and *Voet* 25, 8, 6 and 7.) But if parents owe this duty to their children the latter owe a reciprocal duty to their parents. If a father or mother is in distress and unable to work, his or her children who have the means can be compelled to contribute towards their parents' support (*Voet* 25, 8, 8). It would make no difference that the children are minors, for the obligation does not arise out of any implied contract but out of the sense of dutifulness which every child is presumed to entertain towards his parents. An instructive case is to be found in the *Dutch Consultations* (2, 279), where it was laid down that children are not bound to support their parents if the former have only just sufficient means to support themselves, but that, failing either of these conditions, the tutor of a minor child is bound to maintain his ward's indigent parents out of funds belonging to the minor. If this duty rests upon a minor child, it must, in my opinion, be held equally to rest on a child who has been declared to be insane. In the case before us there exists no doubt whatever that Knoop junior has an income considerably in excess of his requirements and that his father is reduced to extreme poverty. The son has been declared a lunatic, but the Master of the Supreme Court will be authorised to pay out of the lunatic's income the sum of £5 a month towards the alimentation of the father during the declining days of his life. The costs of this application will come out of the lunatic's estate.

Their lordships concurred.

[Petitioner's Attorney, C. C. de Villiers.]

WICKS V. WICKS. } 1898.
Aug. 8rd.

Mr. Searle moved for a rule nisi requiring petitioner's husband to show cause why she should not be admitted to sue him in *forma pauperis* by edictal citation in an action for divorce by reason of his alleged adultery. The defendant had gone to Johannesburg.

The Chief Justice: Take a rule nisi returnable on the 1st November, personal service to be

effected if possible, failing which, one publication in the Johannesburg "Star." The rule, citation, and interdict to be returnable on 1st November.

MEYER V. MEYER.

Mr. Tredgold applied on behalf of the petitioner for leave to sue in *forma pauperis* in an action against her husband for divorce, by reason of his alleged adultery.

Referred to counsel.

In re REGINA V. GABRIEL. } 1898.
Aug. 8rd.

The Chief Justice said: It has been brought to the notice of the Court by our brother Buchanan, who presided at the last Criminal Sessions, that a man named Gabriel, a conveyancer, was found guilty of the crimes of fraud, forgery, and theft. I understand that the Law Society takes no cognisance of cases relating to conveyancers, considering that their duty is confined to attorneys and notaries. The Court having their attention called to this case cannot ignore the circumstances. In a previous case, that of Cairncross, the presiding judge of the circuit of his own motion called upon an attorney, charged with a serious offence, to show cause why he should not be struck off the rolls as an attorney, even though he was found not guilty, the evidence was so strong against him. Therefore we shall call upon Gabriel to show cause by this day week why he should not be struck off the roll as a conveyancer. The notice will be sent by the Registrar of the Court.

Mr. Justice Buchanan: I may say I had no information before me at the trial that Gabriel was a conveyancer. I did not know he was a professional man.

JESSON V. JONAS. } 1898.
Aug. 8rd.

False imprisonment—Malicious arrest—Real injury—Reasonable cause—Constable—Credible information—Ordinance 40 of 1828, section 23.

In an action against a constable for malicious arrest, it appeared that he arrested the plaintiff upon information supplied by the owner of a coat which had been stolen from along a roadside and which he had found in the possession of the plaintiff shortly afterwards.

Held, that the defendant, having acted bona

fide upon credible information supplied to him by others, which would justify the conviction of the plaintiff for theft, was protected from liability.

This was an appeal from a judgment of the Resident Magistrate of East London in an action in which the present respondent (plaintiff in the Court below) sued the appellant (defendant) for £20 damages for malicious and wrongful arrest.

The facts appear from the Magistrate's judgment, which was as follows: In this case the plaintiff is a native farmer residing in this district, and the owner of a wagon and oxen, &c., and the defendant is a private in the Cape Police stationed at Fort Jackson. I found the following facts proved: On the 27th April, 1893, the plaintiff was proceeding to East London with his wagon loaded with Kafir corn. A man named Falloi being the driver of the wagon, and a lad named Umpini the leader. On approaching the Fort Jackson outspan the driver picked up a jacket in the road, being under the impression that it was the jacket of a young son of the plaintiff, who was with the wagon. The jacket in question had on the morning in question been placed by the owner on the side of the road, but other wagons had passed just before the plaintiff's wagon, and the jacket may then have been moved to where Falloi found it. The plaintiff at once, on seeing the jacket, said it did not belong to his son, and ordered it to be taken back to where it was found. The driver Falloi at once handed it to Umpini, and told him to take it back. On the way back Umpini met the man Smile, who was one of the road party working in the neighbourhood, and told him where he was taking the coat. Smile then took Umpini with the coat back to the wagon, which was then outspanned, and plaintiff at once explained to Smile how the coat had been picked up by Falloi, and as it did not belong to them it was sent back. Smile upon that went to the police camp at Fort Jackson, and reported the matter to defendant, who was at the time in charge of the camp. Defendant thereupon proceeded to plaintiff's wagon. Plaintiff at once told me he was the owner of the wagon, and fully explained the circumstances of the picking up of the coat. The defendant then arrested plaintiff and Falloi, and sent them as prisoners to East London, where they were on the 28th April, 1893, tried for theft and acquitted.

The evidence shows clearly that no theft had been committed, and the facts were fully in the possession of the defendant at the time of the arrest.

The arrest was improper, and the defendant

acted without reasonable or probable cause, and the plaintiff was therefore in my opinion bound to succeed.

The defendant, in his evidence, stated that Smile came to the camp and lodged a complaint against the plaintiff. He stated that his jacket had been stolen, and that he had found it in the possession of the plaintiff, and wished me to take him into custody. That he went with Smile to where the wagon was outspanned at Fort Jackson, that when he arrived he found the plaintiff there and saw the jacket lying on the ground under the wagon. Smile said, "Those are the men, and there is my jacket that was stolen by them." He pointed to plaintiff and the man Falloi, and the jacket in question, and asked him (defendant) to arrest the two men in question. He (witness) thought it was a clear case of theft, and arrested them and sent them to East London.

The Magistrate gave judgment for the plaintiff for £5 with costs.

The defendant now appealed.

Mr. Juta was heard in support of the appeal.

There was no appearance on behalf of the respondent.

The Court allowed the appeal.

The Chief Justice said: The plaintiff was arrested by a constable acting in the ordinary course of his duties upon apparently credible information supplied to him by others. It is not a case therefore in which the mere fact of arrest gives rise to an action for false imprisonment. If the arrest had been made *vezandi causa*, as *Ulpian* expresses it (*Dig.* 47, 10, 18, section 8) or *dolo malo*, as *Voet* expresses it (47, 10, 7), the "real injury" thus committed would have given rise to an action for malicious arrest. It has, however, been the constant practice of this and other South African Courts, in such actions, to require proof from the plaintiff of the defendant's malice and want of reasonable and probable cause. Neither one nor the other has been proved in the present case. The man Smile, who missed his coat from along the roadside shortly after the wagon had passed, followed up the wagon and found the coat in the plaintiff's possession. He thereupon gave information to the defendant at the Fort Jackson police office to the effect that his coat had been stolen and found in the plaintiff's possession. The defendant proceeded to the wagon in the ordinary course of his duty, and there Smile pointed to the coat lying under the wagon and asked the defendant to arrest the plaintiff. The Magistrate, in giving judgment for the plaintiff, was much influenced by the fact that the plaintiff had explained to Smile how he came into possession of the coat, but the defendant was not present when this explanation was given. The defendant had credible information of the commission of a theft and of facts which

would justify the conviction of the plaintiff. Was he then to constitute himself the judge of the plaintiff's guilt or innocence? If such a duty were cast upon police officers their position would be unbearable. The 23rd section of Ordinance No. 40 of 1828 expressly gives them the power of arresting in cases of crimes of the commission of which they have credible information from others. The 12th section of Ordinance 73 of 1880 extends this power to cases where they have reasonable grounds to suspect any person of having committed theft of any cattle, sheep or goat, or any other crime of equal degree of guilt. The difference between the powers of constables and private persons is indicated by the 15th section of the later Ordinance, for in the case of the latter it is expressly provided that every arrest on suspicion is made at their own peril if the party so arrested be innocent. It may well be doubted whether the theft of a coat is of equal degree of guilt with the theft of cattle, sheep or goats, and therefore I prefer basing my judgment upon the 23rd section of Ordinance 40 of 1828. The defendant had credible information of the theft of the coat by the plaintiff, and although in the result the plaintiff was acquitted, the defendant is, in my opinion, protected from liability for his act. The appeal must therefore be allowed and judgment entered for the defendant with costs.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinck.]

MANAGERS OUDTSHOORN PUBLIC { 1893.
SCHOOL V. WHITE. { Aug. 3rd.

School regulations—Guarantee.

It is no defence to an action upon a sub-guarantee signed by householders to supplement the ordinary income of a public school that the deficiency sued for was caused by a debt incurred before the giving of a sub-guarantee, if such debt was properly incurred by the managers.

Where a loan has been raised for the purpose of purchasing land and building school buildings, the interest upon such loan forms a charge upon the current income of the school.

This was an appeal from a decision of the Resident Magistrate for Oudtshoorn in an action in which the appellants (plaintiffs in the lower Court) sued the respondent for £1 18s. 4d., being one-third of the amount guaranteed by him.

The summons alleged:

1. That on or about the 1st July, 1891, the defendant undertook and guaranteed in writing to pay the plaintiffs the sum of £5 sterling, or such portion thereof as might from time to time be found necessary to supplement the ordinary income of the First-Class Undenominational Public School for Boys at Oudtshoorn, which undertaking or guarantee was to hold good for a period of three years from the 1st July, 1891.

2. That thereafter, in or about the month of November last, the plaintiffs required one-third of the amount guaranteed to supplement the ordinary income of the said school, and called upon the defendant to pay the sum of £1 18s. 4d., being one-third of the amount guaranteed by him. Yet the defendant, although requested so to do, failed, and neglected to pay the said amount.

Wherefore the plaintiffs prayed for judgment for the said sum of £1 18s. 4d., with costs.

The defendant, in his plea, admitted his signature on the guarantee list, but denied liability on the following grounds:

1. That the undertaking or guarantee is specially stated to be in accordance with Government regulation—to wit, Schedule A of Act 18 of 1865 and amendments thereto

2. That such guarantee is merely that the salaries of certain masters and expenses of boarding department shall be duly paid.

3. That the revenue of the school is more than sufficient for the payment of half-share of such salaries and boarding expenses, Government paying the remaining moiety, and that such salaries and expenses are duly paid.

4. That at the time of the signing of the guarantee by the defendant, he was duly informed by the then secretary that the guarantee was required merely to obtain the Government aid so provided for in the above-mentioned schedules and for no other purpose whatever, and that towards the general expenditure and back debts of the school a donation was solicited from the defendant and duly given by him.

5. That as shown in last year's statement, framed in accordance with Government regulations, to wit, from June, 1891, to June, 1892, after payment of above masters' salaries and boarding expenses and also rates and taxes and costs of cleaning school premises, &c., there was a balance in hand of £67 10s. 6d., exclusive of £31 8s. donations collected, and that any deficiency in school funds is the result of liabilities incurred as far back as December, 1889, and that for such debt former guarantors have been allowed to go free and not excused, and that by their own actions plaintiffs (in not enforcing payment from former guarantors, and further, by the wording of the present guarantee form and the interpretation placed thereon by other school managers at the time of soliciting guarantees and

donations) are precluded from holding the present guarantors liable for this deficiency.

The defendant lastly pleaded the general issue. The plaintiffs joined issue on the above plea, and especially objected to paragraph 4, as introducing oral evidence to vary a written document.

The Magistrate gave judgment for the defendant with costs, the following being his reasons :

The contention raised by the defendant in this action is that his liability for calls under his guarantee does not extend beyond contributions where there is a shortfall in the salaries and house rent of teachers and no more. In his view of his position the defendant appears to be fully supported by the Educational Act, the evident interpretation placed thereon by the Educational Department in its Manual, and by the evidence adduced as to the representations made to the guarantors at the times their signatures were solicited. It seems perfectly plain that the Act provides only for a guarantee for salaries to an amount equal to that which will entitle the managers to claim from the Government a like contribution in aid. No guarantee other than that appears to be in any way contemplated, nor does the Government require anything further.

From this judgment the plaintiffs now appealed.

Mr. Searle was heard in support of the appeal. He contended that the schedules to Act 18 of 1865 had been repealed by the regulations as contained in the Educational Manual.

The Magistrate had his attention directed only to the guarantee referred to at page 10, paragraph 4, of the Manual, and not to the guarantee at page 56, under which the defendant in the present case was liable.

Mr. Juta, for the respondent, contended that he was only liable under the first guarantee for half salary of teachers, house allowance, and rent.

The Court allowed the appeal.

The Chief Justice said : The guarantee under which it was sought to make the defendant liable in this suit is as follows : " We the undersigned undertake to pay in accordance with Government regulations when called upon by the managers of the above school the amount opposite our respective names or such portion thereof as may from time to time be found necessary to supplement the ordinary income of the school, and we declare that this guarantee will hold good for three years from 1st July, 1891." The liability must be gathered from the document itself, read by the light of the Government regulations to which it refers and not from the loose conversations which are said to have taken place between some of the managers and guarantors. Under the regulations there are two kinds of guarantees, viz., that which is given by the managers to the Government for the due payment of the teachers' salaries, and that given by householders to the

managers to enable them to carry on the work of the school. The latter is called in the regulations a "sub-guarantee." The Magistrate seems to have assumed that the defendant was sought to be held liable under the first kind of guarantee, whereas his obligation, if any, arises under the second. The defence was that the deficiency was caused by a debt which had been incurred in previous years, and for which the sub-guarantors of previous years ought to have been sued. But there is nothing to show that the debt was one of which the whole burden ought to have been thrown upon previous sub-guarantors. Land had to be purchased and buildings built, and it was only fair that the interest on such expenditure should form part of the current expenses of the school. It was in order to make good those current expenses that the sub-guarantors were asked for their subscriptions. The appeal must be allowed and judgment entered for the plaintiffs for the amount claimed, with costs in this Court and in the Court below.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondents' Attorneys, Messrs. C. & J. Buissin  .]

MANAGERS OUDTSHOORN PUBLIC SCHOOLS V. KEATING. { 1898.
Aug. 8rd.

Tender—Condition.

In an action by Managers of a Public School against a sub-guarantor for one-third of the amount guaranteed by him the defendant tendered the amount claimed subject to its being refunded if judgment should be given on appeal to the Supreme Court in favour of another sub-guarantor who had likewise been sued for a similar amount on his guarantee.

Held, reversing the Magistrate's decision that this was not such an unconditional tender as the plaintiffs were bound to accept.

This was also an appeal from a judgment of the Resident Magistrate of Oudtshoorn in an action in which the present appellants sued the respondent for the sum of £1 18s. 4d., being one-third of the amount guaranteed by him.

The defendant pleaded :

1. A judgment of this Court (the Resident Magistrate's Court) in the case of plaintiffs v. White for same cause of action, an appeal from which is now pending, and is set down for argument and hearing on 1st August in the Supreme Court,

2. That the present defendant has tendered the amount claimed subject merely to refund if judgment of this Court in the case of plaintiffs v. White be reversed on appeal.

We pay amount claimed into court and pray judgment in terms of tender with costs.

The facts were the same as in the preceding case.

The Magistrate dismissed the case with costs.

The following were the Magistrate's reasons :

The defendant is one of several guarantors for the due payment of the "ordinary income" of the Boys' Public School at Oudtshoorn, in terms of the regulations governing grants in aid from the public revenue. On the 6th April last the managers sued one White, also a guarantor, for his contribution alleged to be due in respect of such "ordinary income." Judgment was given for defendant and plaintiffs appealed.

While this appeal is pending in the Supreme Court plaintiffs' attorney made a demand on defendant for payment of a proportionate share of the sum guaranteed by him.

To this letter defendant replied through his attorney and enclosed the amount demanded. The plaintiffs' attorney returned the money on the ground that it was a tender coupled with a condition which made it illegal and proceedings were thereafter instituted in this Court for the recovery of the sum claimed.

At the hearing defendant's attorney

1. Raised certain exceptions.
2. Pleaded the previous payment or tender.
3. Again tendered the amount into court.

Plaintiffs' attorney admitted the tender but adhered to his previous reason for its rejection. He made the further extraordinary admission that the real object of this action was to supply some deficiency of evidence in the pending appeal in the action against White and that this was done on counsel's advice. It is thus made plain that the defendant was forced into Court not because he had refused payment or tendered payment subject to a condition which the plaintiffs could not accept, but in order to extract from him the evidence, whatever that might be, which they needed to sustain their appeal in White's case. Now as a fact there was no condition imposed precedent to payment, the money was at once paid, and all the defendant sought to convey was clearly a mere notification that he took a stand similar to White's, and expected a refund in the event of the respondent White proving successful.

Plaintiffs then get what they demanded. What more did they want? Certainly not the defendant's money but the missing link in their former evidence.

The payment by defendant evidently defeated plaintiffs' object and created an embarrassment,

which could only be overcome by the phantom of an unacceptable condition, thereby forcing defendant into court.

If the plaintiffs are successful in their appeal against White I apprehend that the defendant in common with co-guarantors must pay, but to sue the defendant for the purpose admitted is a mode of procedure which I think should not be encouraged. The plaintiffs' better course would surely have been to abandon the appeal if the evidence was too weak to support it, and to proceed afresh when they might have adduced such further evidence as they deemed requisite.

Under all the peculiar circumstances of the case the conclusions I arrived at were :

1. That there had been no absolute refusal to pay.
2. That there was no question of tender, there having been actual payment.
3. That the alleged condition was not such as could have affected or influenced the plaintiffs at all, and
4. That as the defendant had been dragged into court needlessly and without apparent cause of action, he is entitled to have the case dismissed with costs. It may perhaps be urged that it would have been better to give judgment for plaintiffs with costs to defendant, assuming of course that the tender was good. My answer is, that apart from the objections already stated such a judgment would have had the effect of practically overruling my decision in White's case, while the defendant would have had recorded against him a final judgment, from which his only chance of relief would have been by the expensive process of an appeal.

From this judgment the plaintiff now appealed.

Mr. Searle was heard in support of the appeal, and contended that the defendant was bound either to deny or admit his liability, he could not blow hot and cold. He wished to pay the money and then get it back under certain conditions. This amounted to a conditional tender and as such was bad.

The case should be remitted to the Magistrate to decide upon the merits which he should have gone into.

Mr. Juta, for the respondent, admitted that the Magistrate had erred in giving judgment as he did, at the same time the appellants should not have brought the present case until their appeal against White had been decided. The Court should mark its disapproval when considering the question of costs.

Mr. Searle, in reply : The Magistrate in his reasons had gone beyond the record. The plaintiffs were quite within their rights in going to Court.

The Court allowed the appeal.

The Chief Justice said: We shall enter the judgment which the Magistrate ought to have entered. The defendant was quite willing to let the decision in the previous case guide the decision in the present case, and was prepared to pay the money sued for to the plaintiffs subject to that decision. That was not such an unconditional tender as the plaintiffs were bound to accept, but it would have been far better for the plaintiffs to have allowed the matter to stand over until the appeal had been heard—appeals do not take long in this Court. Still the plaintiffs were within their rights in going to court. What the Magistrate ought to have done, in my opinion, was to have given judgment for the amount sued for, each party to pay his own costs, but he did not do so. The appeal will be allowed, and judgment entered for the plaintiffs with costs in this Court, each party to pay their costs in the Court below.

Their lordships concurred.

[Appellants' Attorneys, Messrs Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. C. & J. Buissinac]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte STEELE AND WIFE. { 1898.
Aug. 4th.

Marriage—Post-nuptial contract—Registration.

Where parties had married with the intention of excluding community, but had omitted to execute an ante-nuptial contract before the marriage, the Court authorised the registration of a post-nuptial contract.

This was an application for an order authorising the Registrar of Deeds to register a post-nuptial contract as though it had been executed before the marriage.

The facts are briefly these:

Both the petitioners were born in England. The second petitioner (Mrs. Steele) arrived in Cape Town by the R.M.S. Norham Castle on the 1st instant. On the 2nd August last the parties were married by special licence before the Resident Magistrate for Cape Town.

Before their marriage, but on the same day, they instructed their attorney to draw up an ante-nuptial contract having the effect of excluding community of property.

Before the contract was signed the parties went to the Magistrate's Office, where they were married, believing, as they alleged, that the documents which they signed in the Magistrate's Office were merely to complete the ante-nuptial contract.

On returning to their attorney, they were informed that inasmuch as the contract had not been executed before the marriage, it would not be registered without leave of the Court.

The parties now asked for relief under the circumstances above set forth, and alleged in their petition that their marriage was solemnised with the full intention on their part that each should absolutely possess his or her property, both present and future of every kind, separate and free from the other of them. They further alleged that they were not indebted to any person, and did not owe any debts, and they prayed the Court to grant an order authorising the Registrar of Deeds to register the marriage contract as though it had been executed before the marriage.

Mr. Graham was heard in support of the application, and relied on *Ex-parte Fricker and Wife* (2 Sheil, 812), and *Schoombie v. Schoombie's Trustees* (5 Juta, 189).

The Court granted the application in terms of the prayer, the order not to affect creditors subsequent to the marriage and prior to the registration.

[Petitioner's Attorney, John Ayliff]

DE STADLER V. DE STADLER. { 1898.
Aug. 4th.

This was an action for divorce, instituted by Mrs. Margaret Mary de Stadler (born Morgan) against her husband, George Francis de Stadler, on the grounds of his adultery.

The declaration alleged that the parties were married in community of goods at Cape Town on 1st September, 1879. That there were four children of the marriage. That on divers occasions during the past seven years, and in the district of Simon's Town, the defendant committed adultery with one Esther Maria Hart, and also in the year 1887 the defendant on several occasions, and at Simon's Town, committed adultery with one Scotch Maggie.

The plaintiff prayed:

(a) That it might be decreed that the marriage be dissolved.

(b) That plaintiff be declared entitled to the custody of the minor children.

(c) That defendant be declared to have forfeited all right to the estate held in community of property

(amended at the suggestion of the Court to a prayer for a division of the joint estate).

(d) That the defendant be ordered to pay plaintiff monthly a reasonable sum, to be fixed by the Court, for the maintenance and education of the children during their minority.

(e) Further relief, with costs of suit.

The defendant, in his plea, admitted the formal allegations in the declaration, denied the charges of adultery, and prayed that plaintiff's claim might be dismissed with costs.

Mr. Buchanan appeared for the plaintiff, and Mr. Graham for the defendant.

The plaintiff, Margaret Mary de Stadler, deposed to the formal facts stated in the declaration. She did not live happily with her husband after the birth of her first child. He ill-treated her, and she suspected that he had taken up with other women. She found two letters addressed to her husband from the woman Hart. They were in the most endearing terms, the first commencing, "My dearest darling pet," and ending, "With love and kisses from M S.E.H."

By the Court: I do not know the writing. I knew from whom the letter came by the initials at the bottom.

Plaintiff then identified a second letter which commenced, "My own dearest love," and contained many terms of endearment. It was signed "Esther." She stated further that she had found a letter from her husband to the woman Hart couched in similar terms. Her husband denied that he had sent the letter. She had to leave the defendant twice owing to his ill-treatment. Her husband had been cruel to the children. On one occasion he beat her little boy with a leather strap, and on another occasion he turned the children out of the house when it was raining. One of the children was consumptive. Defendant had a farm at Simon's Town and, independent of its produce, received £9 or £10 a month from wood and rents. Two of the children were with her parents, one in Kimberley, and the other with herself.

Cross-examined by Mr. Graham: Her husband did accuse her of being extravagant, and complained of having to pay an account of £40 odd. She left him on some occasions for short periods when he ill-treated her. The drawer in which she found the letters was locked, but she opened it in her husband's absence. She wrote to him up to 1898 merely to let him know how the children were. Esther Hart was in her employment as a servant.

By the Court: If she succeeded in getting a divorce she intended living in Simon's Town and supporting the children by taking in sewing and giving music lessons.

Martinus Mentor, a coloured man, and Henrik Williams gave evidence in support of the charge

with respect to Esther Hart, and two Malay women, named Norman, deposed to the alleged impropriety with Scotch Maggie. One of them denied having any recollection of having signed a document produced, stating that she had never seen the defendant in a house of disrepute, and never made any statement against his character.

The defendant, George Francis de Stadler, denied that he had committed adultery with Esther Hart, who was in his service. He and his wife disagreed about money matters, as she contracted considerable debts. He did not ill-treat her, but on one occasion when he was very angry with her he struck her. She had left him three times. He wrote the letter addressed to Esther Hart as a trap. He denied there was any truth in the allegation with reference to Scotch Maggie. With regard to the letters found in his drawer by his wife purporting to be written by Esther Hart, the defendant, after considerable hesitation, could not deny that he had received the letters, but could not say if they had been written by Esther Hart. He made only £4 or £5 a month from the farm.

Esther Hart was examined, and denied that she had been guilty of improper conduct with the defendant, or that she had written the letters found.

Peter Kallis, Kate Kallis, and Nicholas Hart were also examined for the defence.

Mr. Graham was heard for the defence; Mr. Buchanan was not called upon.

The Chief Justice, in giving judgment, said: If the letters produced in this case are genuine, they certainly are very strong presumptive evidence that adultery was committed by the defendant with this girl Esther Hart. I have no doubt whatever as to their genuineness. The defendant himself, when in the witness box, could not swear distinctly that he had not received those letters. I am quite satisfied if he received them he must have remembered them, as they are in the most endearing terms, and written by a former servant girl of his, and certainly he could not have forgotten the circumstance of receiving them. And not only did he receive them, but he treasured them up, keeping them in a drawer, which he kept locked, until his wife got access to the drawer and became cognizant of them. The letter written by himself to the girl he explains by a lame excuse that it was sent by a boy as a trap. He must certainly believe the judges to be very credulous indeed if he thinks they will accept a statement of that kind. What the nature of the trap was was not explained at all, and this letter was sent along with two other letters, which the defendant certainly intended should be delivered to the persons to whom they were addressed. These letters being genuine, we shall not require very strong further evidence as

to the fact that adultery was committed, and whatever link is required is supplied by the evidence of Mentor. That something of the kind stated by him did take place is evident from the fact that De Stadler remembers a circumstance of that kind taking place. Mentor says he remembers seeing him in the girl's room, trying to screen himself, and I believe that evidence. I also believe the evidence of Williams, who saw him going to the bush with this girl. With regard to the adultery with Scotch Maggie, I believe the Malay woman's evidence. It is not at all to the defendant's credit that he got this woman to sign this document under the impression that she was taking an oath. I look with the greatest suspicion upon attempts of this kind to stifle evidence, and this document, which the defendant seemed to think would help his case, is in my opinion the strongest evidence against him. I am quite satisfied that adultery was committed with Scotch Maggie, and that being so, I need not say that I do not believe the evidence of defendant and his witnesses. The Court will grant a decree of divorce with costs, declaring the plaintiff entitled to the custody of the children, the defendant to have access to the children at reasonable times and places, and that the defendant pay the plaintiff forthwith the sum of £50, in lieu of half the property held in community; the defendant also to pay to the plaintiff the sum of 10s. per month towards the maintenance of each child of the marriage until the children respectively reach the age of sixteen years.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buismé; Defendant's Attorney, J. Hamilton Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

DAVIDSON V. DAVIDSON. { 1898.
Aug. 7th
& 8th.

This was an action for divorce instituted by Mrs. Mary Garish Davidson (born Mann) against her husband, the Rev. John Davidson, on the grounds of his adultery.

The declaration alleged that the parties were married on the 27th December, 1881; that there was issue of the marriage three children, all minors.

That during the month of April, 1898, at Sea Point, the defendant committed adultery with Jennie Lind Cooke, of Sea Point.

The prayer was for:

- (a) A decree of divorce.
- (b) Forfeiture of rights of community of property.
- (c) Custody of the minor children.
- (d) Further relief, with costs of suit.

The defendant in his plea admitted the formal allegations in the declaration, but denied the charge of adultery.

Mr. Rubie appeared for the plaintiff; the defendant conducted his case in person.

The plaintiff deposed that she was married at Aberdeen, in Scotland, on December 27, 1881. After residing in Scotland, India, and other places, she came to Cape Town on the 5th January, 1898, her husband having preceded her in September, 1892. Proceedings for a judicial separation were commenced by her on 12th March last. On the evening of the 28th April, when she was living at Bearwood Cottage, she received some information respecting her husband, in consequence of which she went to the house in which he was living. She reached there at a quarter to ten, and stationed herself in the court behind the dining-room. It was a clear moonlight night, and she had a view of the back gate leading from the back door. While standing there, she saw Mrs. Cooke and defendant come out through the gate. She heard the door shut but did not see them come out of the house. She had met Mrs. Cooke two or three times before at Mrs. Goldsworthy's house, and on one occasion in her own (plaintiff's) drawing-room. She addressed Mrs. Cooke by name, and touched her on the arm. She said "You are Mrs. Cooke," and she replied "Yes," and was going to make an explanation of some sort, but plaintiff said it was unnecessary, that she had recognised her. Both Mrs. Cooke and her husband came out on tip-toe. She went to call the constable, who was stationed in the garden. He was watching, and knew that Mrs. Cooke was in the house with her husband. She knew the constable had been employed to watch. Since their marriage her husband had treated her kindly at times, but he had struck her since they came to the Colony.

The plaintiff was then asked if her husband was a man of temperate habits.

The defendant objected to the question as being irrelevant.

Mr. Rubie submitted that it was relevant, as it affected the custody of the children.

Defendant said he had no objection to his wife having the custody of the children if the Court so ordered.

The Chief Justice said that although the defendant was willing to give up the custody of the

children, the Court was not bound to order it. On the question of the custody of the children, the question whether the defendant was guilty of intemperance would be relevant. Besides it was to the advantage of the defendant that the evidence should be given so that he might have an opportunity of denying it. The fact of his objecting to the question might lead to certain inferences unfavourable to him.

Plaintiff then stated that defendant was most intemperate.

Cross-examined by defendant: The incident of meeting himself and Mrs. Cooke occurred on April 22, not April 25. I ascertained the time from a friend who was near, Dr. Pearson.

Cross-examination continued: I am not aware that anything has been paid to the constable, who conveyed to me the information that my husband was in the house with a lady. A sergeant was in the garden some time before. I am not aware my husband was a total abstainer for six years. He was not when we were in India, but was for sixteen months in Suffolk. We were married against the express wish of my father, brothers, and sisters, but they did not in consequence of this take every opportunity of venting a grudge against you, and alienating my affections. They were against you on account of your intemperate habits.

The Chief Justice: That was before the marriage?—Yes, my lord. I did not know him as well as the others. We were to be married in June. Invitations were sent out, and all preparations made, but Mr. Davidson disappeared, and was not to be found for three months.

Defendant: Wasn't that the fault of your father, who wanted me to sign a marriage contract?—No. You were for a week in a state of total drunkenness, and then disappeared to the South of England.

The Chief Justice: Notwithstanding that, you married him afterwards?—Yes, unknown to my father.

In further cross-examination the witness admitted that she was only acquainted with these matters from hearsay, having been informed of them by her father's solicitor and her brother.

The Chief Justice: What I cannot understand is your marrying him at all after that.

Cross-examination continued: When my husband came to Nairn to see me he was not prevented by my father, but he came in a condition unfit to see any person. That is the report I heard from my friends. My father sent my sister and myself away, so that I should have no opportunity of meeting or corresponding with Mr. Davidson. I left my husband in London five years ago, and instituted proceedings for divorce on the ground of adultery. I did not prosecute the case, as he asked me to return for the sake of

the child. My friends would have been glad if I could have remained with my husband. My father died three weeks before I sailed for the Cape.

Q. Are you not of an excitable, impulsive, and imaginative nature?—A. You have said that to me before.—The plaintiff admitted that she was impulsive, denied that she was imaginative, and said that she might be excitable. Her husband had never spoken to her about her temper until they came to the Colony. He always said she was most amiable.

The Chief Justice: You might be amiable and at the same time impulsive.

Plaintiff: I am impulsive, but I never do anything through impulse.

Defendant said his wife had stated in the Goldsworthy case that she came out to the Colony as a loving wife to join her husband. He asked now if she was still a loving wife with a plausible manner and an angelic disposition.

The Chief Justice: Plaintiff had said nothing about an angelic disposition.

Defendant: You have some peculiar ideas regarding relationship, have you not?

The Chief Justice: What do you mean?

Defendant: With regard to the relation in which I stand to her, and her own family stand to her. (To plaintiff) In your affections your brothers and sisters have first place, your children second, and your husband third.

Plaintiff: That is so now. It was not so before. I cannot now respect my husband.

In further cross-examination, plaintiff denied that she caused trouble immediately after her arrival by interfering with Major Goldsworthy and his wife. She asked her husband to request Major Goldsworthy not to come to the house, for he and her husband drank together. It was a fact that she and his sister sent to the Sea Point Hotel for portac, but never took it without her husband's knowledge. She did not object to his taking drink in moderation, but she had so many homes broken up by it that she was naturally opposed to having drink in the house. She never had anything to do with breaking up these homes herself. For some time after she came to the Colony she was in secret correspondence with her sister, Mrs. Grant, who used to send two letters by each mail—one that might be shown to her husband, and one marked "private." To make sure of secrecy, she had those letters addressed to the Post-office, and afterwards had a private box. That was not inconsistent with the description of a loving wife, because she asked her sister to write privately with regard to her father's estate. Her sister (Mrs. Goldsworthy) disliked Mrs. Cooke, and she shared the dislike. Four or five days after her arrival her husband told her that Mrs. Cooke's character was questionable. She

noticed no undue familiarity beyond the incident mentioned. Her husband's usual manner underwent a change in Mrs. Cooke's presence, and her sister told her that Major Goldsworthy had seen her husband wink at Mrs. Cooke on one occasion. Coming home from Major Goldsworthy's on one occasion, Mrs. Cooke told her (plaintiff) that her husband was an extraordinary man, a new kind of clergyman, and if he were her husband she would not allow him to go about much, and Mrs. Cooke also informed her that she had been in her husband's chambers in Church-street.

Henrik Aubre, a sergeant in the police at Sea Point, deposed that he was on duty with Constable Sheerin. At 8.15 p.m. on April 28 last, he met the Rev. Mr. Davidson coming along the Beach-road with Mrs. Cooke. He met Dr. Pearson walking in the same direction, who asked him to see how long they remained in the house. He (witness) told the constable to change his uniform for plain clothes at the barracks, and come back again while he remained on the watch. He went inside the gate and all around the house, but there was no light whatever to be seen inside. Mrs. Cooke's brother came down to the house while he was there, but did not go in. The constable returned at 9.15, and witness went back to the station.

By Mr. Justice Buchanan: There could not have been a light in the room or I should have seen it. There was nobody living in the house but the Rev. Mr. Davidson.

Constable Charles Sheerin, who took up the watch after the last witness, said he knocked at the door of the house about 9.20, and asked if Major Goldsworthy were there. Mr. Davidson came to the door without any delay, with a candle in his hand. He said Major Goldsworthy was not there. Witness went out and remained in the garden. The light then disappeared.

Dr. Pearson was examined and stated that he saw defendant and a lady on the evening in question and gave certain instructions to the constables.

For the defence Mrs. Jenny Lind Cooke, widow, was examined, and stated that on the evening in question she went with defendant to his house to meet Major Goldsworthy for the purpose of discussing the latter's impending separation case. They went into the dining-room and remained there for twenty minutes or half an hour, but Major Goldsworthy did not come. She remembered Sheerin knocking at the door. She learned afterwards that Major Goldsworthy was all the time about the house watching, because he found that others were watching. Mr. Davidson came to her father's house about seven o'clock, and in presence of her parents asked her to walk out to his house to see Major Goldsworthy. She emphatically denied the allegation of adultery, and said it was a most cruel charge. Both her father and mother knew that she had accompanied Mr. Davidson.

Major Goldsworthy deposed that he never observed any undue familiarity between defendant and Mrs. Cooke. He was approaching defendant's house on the evening in question, when he saw two persons enter. When he came to the house, he heard some voices in the vicinity. He believed there were detectives there, and he did not go in because he wanted to catch the detectives watching. He did not catch them. He finally went home without seeing Davidson. He saw a light in the house. He had never heard anything against Mrs. Cooke's character.

Cross-examined: He did not know who went into the house, and did not try to find out who they were. On July 21, at four o'clock in the morning, he was accosted by a police-constable coming out of Mrs. Cooke's. He had a full answer to the charge that he was seen coming out of her bedroom.

Mr. Justice Upington said this question was not put to Mrs. Cooke in cross-examination.

The defendant then tendered his evidence, and denied the charge of adultery.

This closed the evidence.

The defendant then addressed the Court at considerable length.

The Chief Justice intimated that the Court would to-morrow inform counsel for the plaintiff whether it would be necessary to hear him.

On the following day, August 8th,

The Chief Justice said: Before giving judgment in the case of Davidson and Davidson—

Defendant: Might I make a statement to supplement what I said yesterday?

The Chief Justice: Perhaps it may not be necessary. I was going to suggest, in order to spare the Court the pain of giving judgment on the question of adultery, that both parties consent to a decree of judicial separation, the plaintiff to have the custody of the children, and both parties to retain his or her own property.

Mr. Rubie asked for two or three minutes to consult with his client.

The defendant having had the suggestion repeated to him by the Chief Justice, said he objected to it.

Mr. Rubie said in that case it was unnecessary for him to consider it with his client.

The Chief Justice: Why do you object?

Defendant: In the first place I do not consider my wife a fit person to take charge of the children.

The Chief Justice: I understood you to say at the beginning that you consented to your wife having the custody of the children.

Defendant: I do not mind her doing so if she would look after them in a proper manner, which I have reason to believe she has not done from the time she left my house.

The Chief Justice : That is going away from your original consent.

Defendant : I would not object if I thought they would be properly cared for.

The Chief Justice : This is the first time we have heard that she does not look after the children.

Defendant : I have reason to believe she does not.

Mr. Justice Upington : You did not say so yesterday.

Defendant : No, I did not.

Mr. Rubie : I don't know whether your lordships will allow these statements to be made at this part of the case.

The Chief Justice : It cannot be so, or you would have mentioned it yesterday.

Defendant said the charge against him was adultery, and he wanted judgment as to whether or not he was guilty of that.

The Chief Justice then delivered judgment. His Lordship said : The Court was anxious to avoid if possible giving judgment upon the question whether or not adultery has been committed by the defendant. Our reason for doing so was that there are other than the parties to this suit concerned, as well as the children of the marriage, whose interests we wished to consider. We suggested to the defendant a course which would have enabled the Court to escape the painful necessity of having to state what conclusion it has arrived at upon the evidence. The defendant has not fallen in with that suggestion, and therefore the Court must do its duty. Now, the evidence in this case shows that on the 28rd of April last, when the adultery is alleged to have been committed—

Defendant, interrupting, said his wife stated it was on the 27th

The Chief Justice : Please be quiet. The plaintiff at first did assert that it was on the 27th, but afterwards when her memory was refreshed she said it was on the 28rd. So I understood the evidence. That it was a Sunday is admitted by Mrs. Cooke, and the 28rd April was Sunday, so that this objection does not hold good. On that day the defendant was living alone in his house at Sea Point. There were no servants in the house. On the evening he went to the house of the lady in question, Mrs. Cooke, at about seven o'clock, and she accompanied him to his residence. She says that they dawdled about, and may have taken nearly an hour to have reached the house of the defendant. According to the other witnesses, it was close upon eight o'clock when the defendant and this lady entered the house together. They remained together in defendant's house for nearly two hours.

The defendant, again interrupting, dissented.

The Chief Justice (continuing) : The reason

why the Court says they remained nearly two hours is that the constable saw them enter together close upon eight o'clock.

Defendant again interrupted.

The Chief Justice : You will have to be removed from Court if you interrupt. So do not interrupt again, unless you can be certain that I am stating what did not occur. Mrs. Davidson, the plaintiff, says that she was watching in the back yard, and that she saw defendant and this lady leave the place at the back, saw the door open, and saw them come to the back gate, and it was then a quarter to ten. And from this evidence, which we fully believe, I come to the conclusion that for nearly two hours these people were together in that solitary house. I also fully believe the evidence of the sergeant of police, who says that there were no lights in the house that night. The statement made by the defendant and this lady is that all the time they were in the dining-room. I fully believe the sergeant of police that there was no light in the dining-room on that night.

Defendant again interrupted, saying his lordship was making a mistake.

The Chief Justice : I shall have to send you out if you continue to interrupt. If there had been lights in the house the sergeant of police must have seen them.

Defendant : And Major Goldsworthy also.

The Chief Justice : I say again he must have seen the light if there had been a light. The interruption is *ma'e*, "so must Major Goldsworthy have seen it." I am sorry to have to say that I do not believe Major Goldsworthy's evidence at all. I believe that the whole story given by Major Goldsworthy is a trumped-up story, that he was not there that night, that he saw no lights at all, and that the explanation given by him is wholly untrue. That I fully believe. Having stated that I believe those facts, the conclusion I have arrived at is that the defendant and this lady were alone in that room in the house, that the lights were extinguished, and that after being nearly two hours together they left at the back on tiptoe ; and that whilst so leaving they were seen by the defendant's wife in the back yard. Now I should be sorry upon evidence of that kind alone, if there were some reasonable explanation, to hold that there has been adultery, but at all events so much may be said that this evidence coupled with all the other circumstances disclosed in this case afford some presumptive evidence that the parties were in the house that night for an improper purpose. The Court would have eagerly seized upon any satisfactory explanation as to the reason why these parties were together under such circumstances. At the same time, it must be borne in mind that in cases of adultery it is never possible to prove the actual act. The Court has always gathered the facts from all the circum-

stances, and therefore, looking at all the circumstances of this case, I am sorry to say that no satisfactory explanation is afforded as to why these parties were together there. The explanation given by the lady is that she was requested to come to the house that evening to give some evidence in a case brought against Major Goldsworthy by his own wife, but she could give no explanation why she did not tell the defendant Davidson to bring Major Goldsworthy to her house in order to enable her to give her explanation there. There had been a previous charge made against the same parties in connection with Mrs. Cooke and Davidson, and that was an additional reason why she should avoid going alone to Davidson's house in the manner in which she did. Her whole evidence with regard to what took place that night is wholly unsatisfactory. I then come to Major Goldsworthy's evidence. He was the man mainly interested, according to the evidence for the defence, in meeting Mrs. Cooke that evening at Davidson's residence. He says he was to be there at seven o'clock, but admits there might have been an arrangement that he should be there at half-past seven. His account is that when he went there that evening he heard noises, footsteps, and coming to the conclusion that there were detectives about he thought it his duty to catch them. He came there for the purpose, according to the evidence for the defence, to hear from Mrs. Cooke what evidence she would be able to give in the suit brought against him. Although he saw lights in the house he never entered, and never attempted to have this important communication with Mrs. Cooke. He did not catch the detectives either, so that his object in being there was, according to his only evidence, wholly purposeless. I can quite understand the object of his evidence. It is to remove the strong impression produced on the minds of the Court by the fact that the lights were extinguished while the lady was alone in the house with the defendant. In order to prove that there were lights, it was necessary to show that he was roaming about the neighbourhood and saw lights. I regret to say that I do not believe there were lights in the house, and I think the explanations given on behalf of the defendant are wholly unsatisfactory, and having to decide as a juror upon the question whether adultery was committed, I feel bound to come to the conclusion that the case for the plaintiff is proved and that the adultery was committed. Under those circumstances the judgment of the Court must be for the plaintiff as prayed for, with costs.

The defendant, rising in court and speaking excitedly, said: I beg to say that is the most unjust decision ever given in this court.

Defendant was then removed from the court,

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Mr. Justice Upington: I wish to say that I deplore that the defendant did not accept the suggestion of the Court, and prevent this judgment from being delivered.

[Plaintiff's Attorney, D. Tennant, jun.]

LOTTER V. BRUNSDON. { 1898.
{ Aug. 8th.

Trespass—Fence—Dividing line between farms—Removal—Action for damages—*Valenti non fit injuria*.

Per De Villiers, C. J. :—If two landowners make an arrangement to have a fence between them, and one goes a little beyond the line by mistake, that does not give ground for damages for trespass.

This was an appeal from a judgment of the Eastern Districts Court in an action in which the present appellant (plaintiff in the Court below) sued the respondent (defendant) under the following circumstances as disclosed in the declaration, which was as follows:

1. The plaintiff is a farmer residing at Gori Kraal, or Hume field, in the district of Jansenville.

2. The defendant is a farmer residing at Blauwboschkruil, in the said district.

3. The defendant's said farm adjoins the plaintiff's said farm.

4. At the time of the grievances hereinafter mentioned, there was standing on the plaintiff's said farm a certain wire fence, the plaintiff's property.

5. In or about the month of July, 1892, the defendant by himself and his servants, wrongfully and unlawfully, and without the leave and licence of the plaintiff first had and obtained, entered and trespassed upon the plaintiff's said farm and broke and took down the aforesaid fence and removed it from the plaintiff's said farm.

6. Or otherwise, the plaintiff says that the said fence was a common dividing fence to the plaintiff's and the defendant's said farms, and the common property of the said plaintiff and the defendant, having been constructed in terms of Act 80 of 1888, under an agreement between the defendant and one David Robert Hume, a previous owner of the plaintiff's said farm.

7. In or about the month of July, 1892, the defendant by himself and his servants, wrongfully and unlawfully, and without leave and licence of the plaintiff first had and obtained, broke and took down the said common fence and removed the same from the common boundary line of the said farms.

8. The plaintiff has suffered damage by reason of the removal of the said fence, whether it be the

property of the plaintiff, or the common property of the plaintiff and the defendant, in the sum of £400.

9. And the plaintiff further says that in or about the said month of July, 1892, the defendant by himself and his servants wrongfully and unlawfully entered and trespassed upon the plaintiff's said farm, and cut down a large quantity of wood and bush there being and growing, and dug a large number of holes into the plaintiff's ground.

10. The plaintiff has suffered damage by reason of the unlawful acts of the defendant in the preceding paragraph mentioned in the sum of £100.

Wherefore the plaintiff prays :

(a) That the defendant may be compelled to re-erect the said fence, or otherwise to pay to the plaintiff the said sum of £400 as and for damages for the removal of the same.

(b) The said sum of £100 as and for damages as in the tenth paragraph mentioned.

(c) That the defendant may be compelled to fill up the holes mentioned in the ninth paragraph ; and

(d) General relief and costs of suit.

The defendant filed the following plea :

1. The defendant admits paragraphs 1, 2, and 8 of plaintiff's declaration, but save and except so much as is hereinafter specially admitted, denies the remaining paragraphs thereof.

2. Previous to the plaintiff's purchase of Hume-field, the defendant erected a fence at his own cost between the said farms Hume-field and Blauwbosch-knail.

3. Thereafter plaintiff purchased the said farm Hume-field, and in or about the month of June, 1892, objected to the said fence as not being on the true dividing line between the said farms.

4. At defendant's request, plaintiff undertook to find and show defendant the line which he claimed to be the true one.

5. Plaintiff found the said line, which he claimed, and made a clearance of the bush along it, and appointed a day with defendant to prove his assertion as to its being the correct one.

6. Plaintiff failed to meet defendant upon the day appointed.

7. Defendant thereupon consulted Mr. Surveyor Melville, and finding from him that the line cleared by plaintiff was the true one, defendant proceeded to remove the old fence and put a new one along the said line, which are the acts complained of by plaintiff in his declaration.

8. Plaintiff was well aware of defendant's act in so removing the old fence and putting up one-half of the new fence, and never objected to defendant's so doing.

9. Wherefore defendant prays that plaintiff's claim may be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

The majority of the Court (the Judge-President and Mr. Justice Jones) gave absolution from the instance with costs, finding on the evidence that the fence was not a common fence, or the common property of the neighbouring proprietors, at the time the plaintiff bought Hume-field, and that the plaintiff bought the farm with full notice that the fence in question was erected by, and was the property of defendant, and that he was not purchasing any right in the fence, as being then the property of the trustees of Hume's insolvent estate.

Further, that up to the 28rd September last the plaintiff treated the fence as the property of the defendant, and had, moreover, till then assented to its removal.

On the question of trespass, the same learned judges held that the plaintiff could not complain that the defendant trespassed by placing the half of the fence where it was placed by him, as plaintiff himself pointed out a certain line as the boundary, and the defendant placed his half fence on his (defendant's) side of that line.

Mr. Justice Maasdorp concurred with that part of his colleagues' judgment which dealt with the right of the defendant to remove the fence from the place where it was originally constructed by him. But on the question whether the defendant, after removing the fence, committed an act of trespass in erecting it on the line on which it now stands, the learned judge found that there had been a trespass, and expressed the opinion that he would have given judgment for the plaintiff for £10 damages with costs.

The plaintiff now appealed.

Mr. Rose-Innes, Q.C. (with him Mr. Watermeyer), was heard in support of the appeal.

Mr. Graham and Mr. Shippard appeared for the respondent, but were not called upon.

The Chief Justice, in delivering judgment, said : The case has been very fairly argued on behalf of the appellant, and the Court is in a position to give judgment without hearing counsel for the respondent. If the whole question in this case were whether Melville's survey is correct, or whether the survey made by Roselt is correct, I must confess we should have great difficulty in upholding the decision of the Court below. It appears to me that the judgment of Mr. Justice Maasdorp, as far as the boundaries are concerned, seems the more correct one. The principle upon which Roselt made his survey was more likely to lead to error than the principle which Melville acted upon in his survey. The accuracy of Roselt's survey depends upon the question whether the other lines of the farms are correct or not, whether the fence from A to H is in the correct line or not. If that line is out, and if there is any difference in the angles, it was impossible for him to take a correct line, whereas

Melville in the second survey proceeded on a more correct basis. Taking a point from which A and B were visible, it was quite possible to draw a straight line between these points. Assuming that Melville's line was correct, and that Mr. Justice Maasdorp was correct in holding that a straight line had been drawn by Melville, the question still arises whether such an act of trespass was committed as entitles the plaintiff to damages. There is no claim for a declaration of rights, and the only question we have to decide is whether the plaintiff is entitled to damages for trespass on his farm. On the 20th July plaintiff saw the Minnies at work. The plaintiff put in a crowbar and said that was the line, and the defendant deserted the old line, in which he had made a number of holes, and adopted as correct the line which the plaintiff pointed out. The plaintiff must have known for months that the defendant had gone to expense in making these holes, and he never raised any specific objection to this particular line. The maxim *volenti non fit injuria* applies, and when he consented to this being done he cannot turn round and claim damage for trespass. These holes must have been made in pursuance of an arrangement that there should be some fence. If two landowners make an arrangement to have a fence between them, and one goes a little beyond the line by mistake, that does not give ground for damages for trespass. Besides, the injury done to the plaintiff through these holes was so small and infinitesimal that I do not think we ought in this Court to reverse the decision of the Court below on this small matter. We have come to the conclusion that there is no reason to reverse that decision. It is purely a question of fact, upon which we are almost bound to adopt the view of the majority of the Court below, seeing that it is not contradicted by the evidence and correspondence put in. The judgment of the Court below will therefore be upheld, and the appeal dismissed with costs.

[Appellant's Attorneys, Messrs. Scanlen & Syfret; Defendant's Attorneys, Messrs. C. & J. Buismine.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.O.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.O.M.G.]

NOOTAMA V. MNCUME. { 1898.
Aug. 9th.

Native marriage—"Dowry cattle"—Kafir custom—spoliation.

The Courts of this Colony cannot recognise a Native Custom whereby the husband or heir of the husband, whose wife deserts him during his lifetime or his house after his death, may retake by force or stealth the dowry cattle, given upon her marriage to her father, while such cattle are in his peaceable possession.

The plaintiff's daughter, who was accused by her husband's relatives of having caused her husband's death by witchcraft, deserted his late home and returned to her father, whereupon the husband's heir seized from the plaintiff's land the cattle which had been given to the plaintiff upon her marriage.

Held, that, whether the heir had a right to claim the cattle back or not, he had no right to retake the cattle by force or stealth, and that, upon the principle, spoliatus ante omnia est restituendus the plaintiff was entitled to succeed in an action to recover the cattle so seized or their value from the heir.

This was an appeal from a decision of the Resident Magistrate for Glen Grey in an action in which the present appellant (defendant in the Court below) was sued by the respondent (plaintiff) for the recovery of five head of cattle and two horses, or £20, their value, which cattle and horses the plaintiff alleged the defendant had wrongfully taken possession of on the 15th March last.

The defendant in his plea admitted the possession of the cattle and horses, and pleaded the general issue.

And for a further plea the defendant said that the cattle and horses were originally delivered to plaintiff by one Veka, defendant's son, now deceased, under Tembu custom, as dowry for Nowayile, plaintiff's daughter, upon the marriage of the said Veka and Nowayile, according to the customs of their people, in or about the year 1890.

That the said Nowayile having returned to plaintiff's kraal without the consent of the

defendant, or any of the relations of Veka entitled to give permission, and refusing to return to the kraal of her deceased husband or that of his relations, the contract under which the said dowry was delivered was broken, and plaintiff forfeited all claim thereto by reason of the acts of the said Nowayile, and the property in the said dowry became and is vested in the defendant as the representative of Veka, deceased.

That the cattle and horses being the original dowry delivered as aforesaid, the defendant was, according to Tembu law and custom, justified in possessing himself of the same in the manner in which he did, and that the plaintiff has no longer any claim thereto.

Wherefore the defendant prayed for judgment, with costs of suit.

It appeared from the evidence that before Veka's death (or after that event, according to the plaintiff) his wife, the plaintiff's daughter, left her husband's kraal, and on being sent for, refused to return, being, as she alleged, afraid of witchcraft, as she had been accused of having killed her husband.

The matter was brought before the headman, and he decided that the plaintiff could keep both the cattle and his daughter, as she had been accused of having killed her husband.

After this the defendant (Veka's uncle, the head of the family, and, by native custom, the guardian of Veka's minor son, and his representative) went to the plaintiff's kraal at night, and took possession of the cattle and horses in question, which had been given as *lobola* for plaintiff's daughter on her marriage.

Matwa, a headman and chief by birth, was called to give evidence as to custom, and he stated that if a woman returns to her father's kraal and will not go back to her husband, the dowry must be given up. He further deposed that if in such a case the cattle could not be found on the veld, it would be justifiable by native custom to take them out of the kraal if they were refused to be given up. He gave instances, however, of cases in which the dowry need not be returned, as where the wife has a good reason for deserting her husband's kraal; for example, in the case of the Chief Gangeliwe. He was married to a daughter of the Chief Krelu. He cut off his wife's ear, whereupon she returned to her father's kraal, and Gangeliwe was held to have forfeited the dowry. So also where a man had had his wife smelt out as a witch—he could not recover the dowry.

The Magistrate gave judgment for the plaintiff with costs, the following being his reasons: "That the cattle were in the lawful possession of the plaintiff, and as I could not go into the question of dowry, the plaintiff was bound to succeed. I concur entirely with the headman Matwa's evidence on custom."

From this judgment the plaintiff now appealed.

Mr. Juta was heard in support of the appeal, and contended that there was nothing immoral or improper in the contract of giving a daughter in exchange for *lobola*, which did not stand at all on the same footing as the purchase of a chattel, and differed in *toto* from anything approaching a sale. It was a trust under conditions which seemed equitable and just. It was a security to the wife that she would be properly treated by her husband, because if she were improperly treated she could return to her father, and her husband had no claim to the dowry; and it was a security to the husband that if the wife were induced by her relatives to go back, her father should give up the dowry to the husband.

The Chief Justice said the Court could not recognise any custom by which goods or cattle were taken by force. The maxim *spoliatus ante omnia restituendus* applied, and that any discussion on the subject of the morality or immorality of the custom of *lobola*, however interesting, would be purely academical. The Magistrate's judgment was correct on the pleadings as they stood. If the appellant wished for a decision on the question of the legality of the contract he should have sued the plaintiff for the recovery of the dowry.

Mr. Searle, for the respondent, remarked that he had had no notice that the general question of *lobola* would be raised. He came into court to support the Magistrate's judgment, and took the exception in *limine* that the maxim *spoliatus ante omnia restituendus* applied.

Mr. Justice Upington: Provision was made for cases like the present in the Native Laws Commission, which, however, has not become law.

Mr. Juta admitted, in reply, that in the absence of a claim in reconvention for the dowry, the judgment of the Magistrate was correct.

The Court dismissed the appeal.

The Chief Justice said: In the case of *Nbomo v. Manoxweni* (6 E.D.O., 62) the Judge-President is reported to have said that he could have wished that the case had been brought before a full Bench of the Supreme Court. The Judges of the Eastern Districts Court there differed in opinion, the Judge-President and Mr. Justice Jones holding that in case of a Kafir widow deserting her late husband's home and returning to her father the heir of the deceased husband is not entitled to recover from her father the cattle given to him by her husband on his marriage, and Judge Maasdorp holding that this right exists by virtue of an implied term in the contract between her father and husband. There is much to be said in favour of the view that the marriage customs of the Kafir, so far as they do not conflict with the requirements of a well-ordered state of society, should be admitted as evidence of the intention of the parties to the marriage contract

A custom which requires the father to return the so-called "dowry cattle" to the husband in case of the wife improperly deserting him during his lifetime appears to me to be reasonable enough, but why should the husband's heir be entitled to the cattle if the widow returns to her father after her husband's death? The marriage contract is personal to the parties and ought not on principle to confer any right of detaining her on the wife's relatives. It is by no means clear to me that a custom which virtually treats the wife as a chattel passing to her husband's relatives upon his death is one which the Court can recognise as a term of the contract, but this question really does not arise for decision in the present case. I am clearly of opinion that, whether it is the husband or his wife who is aggrieved, neither has the right to retake the cattle by force or by stealth while in the peaceable possession of the wife's father. The Courts of this colony cannot recognise a custom, if such custom exists, whereby the father, who has acquired the cattle peaceably and lawfully, shall be dispossessed of it otherwise than by due process of law. The cattle now in question were removed by stealth from the plaintiff's land and the ordinary rule applies *spoliatus ante omnia est restituendus*. The Magistrate properly decided that the cattle must, in the first instance, be restored to the plaintiff, and the appeal must therefore be dismissed with costs.

Mr. Justice Buchanan: I agree that the appeal must be dismissed, and I wish it to be distinctly understood that it is dismissed on the ground that this is an action for restitution, and the Magistrate having decided in favour of the respondent, his decision ought to be upheld. This question of Kafir custom is a large question, and a question affecting a large body of natives. It is very necessary that it should be decided by a decision of the Court, or, better still, that it should be settled by Parliament regulating the law upon the subject. The Native Laws Commission referred to by my brother Upington proposed a number of regulations to meet these cases, but they were not made law. A case arose in the Eastern Districts Court when I was on the bench there with reference to the heritable right to the services of the wife after her husband's death, in which it was decided that the heirs of the deceased husband had no right to her services under Kafir custom. That would not affect the question of the morality or immorality of the contract of Ikasi. If the case is to come before this Court it would be well that the validity or invalidity of the personal contract between the husband and father as affecting the heirs should be decided; also what defence is to be set up, for the evidence in this case shows a number of defences. All these questions are open, and this decision is simply that the cattle

having been taken away forcibly out of the possession of the plaintiff must be restored. In the present case the legality of the Kafir custom cannot be decided.

Mr. Justice Upington: I am of the same opinion

[Appellant's Attorneys, Messrs. Findlay & Tait; Respondent's Attorney, G. Montgomery Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

BLAKE V. DE VRIES. { 1898.
Aug. 10th.

Writ of civil imprisonment—Unsatisfied judgment—Promissory note—Provisional sentence.

Mr. Shell moved for a writ of civil imprisonment against the defendant on an unsatisfied judgment of the Supreme Court for £21 8s. 4d., and £18 11s. 2d. costs.

On the 31st May last, provisional sentence was granted against the defendant on a promissory note for £21 8s. 4d. with interest and costs.

Execution was enforced, but the goods attached were afterwards returned to the defendant as they were included in a general bond passed by the defendant on the 5th May, 1886, to one Du Plessis, by whom they were claimed.

The Sheriff made the following return: "The goods and chattels of the defendant, valued at £50, were duly attached, but were subsequently released upon instructions received from the plaintiff's attorneys."

Process in the present proceedings had been duly served on the defendant, but there was no appearance on his behalf.

The Court granted the order as prayed.

[Plaintiff's Attorneys, J. C. Berrangé & Son.]

RUSSOUW V. HARRIS.

Mr. Jones moved for provisional sentence on a mortgage bond for £500, with interest at 8 per cent. from the 1st February, 1884.

Provisional sentence granted.

MUTUAL LIFE COMPANY V. MULLIN.

Mr. Barber moved for provisional sentence upon a bond for £600, with interest at 6 per cent. from 1st July, 1892.

Order granted.

COLLIER AND HILL V. WYLIE.

Mr. Jones moved for judgment under Rule 329, for £480 11s. 11d., for goods sold and delivered. Granted.

REHABILITATIONS.

The following rehabilitations were granted on motion from the Bar: Daniel Jacobus Grundlingh, Johann Conrad Rust, Lewis Walter Ritch & Frederick William Phillips, Alfred Newsome, David Johannes Malan, J.F. son.

ESTATE OF THE LATE STEPHANUS A. ALBERTS. { 1893.
Aug. 10th.

Executor.—Refusal to perform duties—
Insolvency.—Removal.

Mr. Juta moved for an order removing the widow of the said Alberts from her office as executrix of the said estate, by reason of her refusal to perform her duties and of her insolvency.

Application was made also in the case of Rudd v. Alberts against the same respondent for an order for the ejectment of the respondent, and all persons holding by her authority, from certain portions of the farms Buffelsjagsefontein and Waterkloof, situated in the district of Oudtshoorn, sold by the executors of the estate of respondent's husband.

Both motions were heard together.

Mr. Searle, for the respondent, resisted the applications.

After argument,

The Chief Justice said: It is quite clear that there is a deadlock in the administration of this estate, and that the only way to avoid this is to remove one of the parties. I think this woman should be removed, because she is insolvent. She is admitted to be a wholly ignorant woman, and has refused to take any part in the administration of the estate. The Court will, therefore, remove the respondent from being executrix, and authorise the Master to take the necessary steps for appointing an administrator in her stead, with a direction to the Master in the exercise of his power to select an impartial administrator to act with the other executor. The applicant's costs must come out of the estate. With regard to the other application, I think the application must be granted for the ejectment of this woman from the property. The applicant's costs in that case also must come out of the estate.

THE MASTER V. CHAPMAN'S EXECUTORS.

Mr. Giddy moved for a rule nisi requiring Alfred Bevern to show cause why an order shall not be granted for the attachment of his person for contempt of Court in failing to file an account of his administration of Chapman's estate, as required to do by order of Court of the 12th June last.

The Chief Justice: Is the respondent in prison?

Mr. Giddy: I am not aware whether he is in prison or on bail. I am informed now that he is in prison.

The Chief Justice: Take the rule, returnable this day week.

CLAYTON N.O. V. METROPOLITAN { 1893.
AND SUBURBAN RAILWAY CO. { Aug. 10th.

Interdict — Land appropriated for railway purposes—Attempted sale.

This was the return day of a rule nisi (granted on the 6th inst. and which operated as an interdict) calling upon the respondents to show cause, if any, why they and the Registrar of Deeds should not be restrained from passing transfer to William Cowling, or to any other person, of a certain piece of land at the back of the Amsterdam Battery in Cape Town, which land forms portion of certain property expropriated by the respondent company for railway purposes.

The facts upon which the rule nisi was granted are as follows: On the 12th January, 1891, transfer was passed from the War Department to the respondent company of certain land at the back of the Amsterdam Battery, which land had been expropriated for railway purposes.

In November, 1892, the respondent company endeavoured to transfer certain of the land expropriated to John Walker, whereupon the present applicant applied for and obtained an order restraining the transfer. The said order is still in force (*ante* p. 8).

On the 4th inst. the applicant ascertained that the company was endeavouring to transfer the same piece of land which they were restrained from transferring to John Walker to one William Cowling, to whom they had sold it for £1,000.

The Applicant alleged that it would be highly detrimental to the interests of the War Dept in this country if transfer were passed to the said Cowling, or to any other person, of the land in question.

The applicant prayed for an interdict restraining the transfer.

In a further affidavit the applicant alleged that on the 27th March last he received a letter from Cowling, asking him whether he would let to him

(Cowling) a portion of the land at the back of the Amsterdam Battery for a term and at what rate of payment.

That on the 28th of the same month applicant replied informing Cowling that the land belonged to the respondent company and that application had recently been made for an interdict restraining the company from selling this land for private purposes.

That the land applied for by Cowling was not the land now attempted to be sold to him but the portion which was transferred to Philip, and which therefore formed the subject of the last proceedings before the Court and was portion of the land expropriated by the respondent company of which Cowling was now seeking to get transfer.

One of the applicant's attorneys, Mr. Buissinné, filed an affidavit to which he annexed a plan framed by the respondent company's surveyor showing the land expropriated. The deponent drew special attention to the portion marked "station," which was the land sought to be transferred to Cowling, also to the memorandum endorsed on the plan, wherein the following words occurred, *upon the understanding that no portion of the sanctioned area is alienated.*

The affidavit of Colonel Philips, who was commanding the Royal Engineers in the Colony at the date of the expropriation of the land, alleged *inter alia* that the War Department consented to part with the ground at the Amsterdam Battery only and solely with a view to the said ground being applied to railway purposes and to no other purpose whatever.

In the broker's note passed on the sale of the land to Cowling appeared the following heading: *Bought on account of Mr. Cowling of Cape Town. From Mr. J. Walker, Rondebosch, Manager of the Sea Point Railway.*

Mr. Rose-Innes, Q.C., now appeared for the applicant and moved that the rule should be made absolute.

Mr. Juta appeared for the company and read Mr. John Walker's affidavit, in which he alleged *inter alia* :

That the negotiations for the expropriation of the land were left in his hands by the company.

That the company did not desire to expropriate the whole extent of the land shown on the Parliamentary plan, but only a certain portion thereof, but Colonel Philips wished the company to take more than deponent considered was absolutely necessary for the railway. That in order to endeavour to come to some arrangement with Colonel Philips deponent caused the plan, copy whereof was annexed to Mr. Buissinné's affidavit, to be prepared and sent to Colonel Philips. (This plan being an enlarged copy of portion of the Parliamentary plan of the rail-

way.) That from this plan it would be seen that deponent proposed to deviate the line of railway after crossing Alfred-street and keep it as far away from the Battery as possible, and to restrict the expropriation of the land to that portion on the said plan coloured pink, provided the War Department undertook not to alienate the remaining extent of the land shown on the plan and coloured blue, without the sanction of the Railway Company, as it might be required at some future time for railway purposes. A note to that effect was endorsed on the plan. Colonel Philips refused to agree to this and insisted on the whole extent of land being expropriated. As the land could be used for railway purposes and was in fact so used, as ballast and sand were excavated therefrom, it was expropriated, but now that the line was complete there was no further use for for the said land for that purpose, as all the ballast and sand available had been removed.

That it was originally intended to erect a station on portion of the said land as would be seen from the said plan, but that intention was now abandoned as it was found that a station on the side in question would not only be inconvenient but dangerous to passengers, as all the other stations were on the opposite side of the line, and to have a single station on the side of the railway opposite to all others would be almost certain to cause accidents to passengers by reason of their being liable to get out on the wrong side of the train. That deponent had nothing to do with the plan of the railway sanctioned by Parliament, and was not in the Colony when the Parliamentary Bill was passed.

That the matter of compensation was then referred to arbitration, and the arbitrators made their award on the basis of what the land would be worth as building sites.

That at the time and for some period subsequent to passing of transfer of the land in question, Messrs. Van Zyl & Buissinné, the attorneys for the applicant, were the attorneys acting for the War Department and the Railway Company. That the contract between the deponent and the company was drawn by Mr. Van Zyl, the senior partner of the firm, and signed by him as Chairman of the Railway Company, so that the said attorneys had full knowledge thereof at the time of the negotiations in respect of the expropriation of the land in question. That they drew the deed of submission, conducted the proceedings before the arbitrators, and also drew and passed the deed of transfer to the company of the land in question.

That subsequent to the award of the arbitrators and after payment was made of the sum awarded but before passing transfer of the land, the said attorneys addressed the company on the subject of restricting the use of certain portion of the

land in question, and requested the company to give an undertaking in writing that a certain portion of the said land, namely the portion now sought to be transferred, should never be used for other than railway purposes. That this letter was referred to deponent by the company and he absolutely refused, on behalf of the company, to sign any such undertaking, but offered to give up the piece of land referred to on condition that the War Department should refund the proportional price thereof and grant free transfer of a small portion of land at Three Anchor Bay expropriated by the railway. This they refused to do and passed transfer giving the company a free title to the land. Deponent annexed copies of the letters having reference to the above matters, marked "A," "B" and "C."

Deponent craved leave to refer the Court specially to letter marked "B," from which it would appear that the only restriction then sought to be placed on the use of the land referred to that portion on the Battery side of the railway. Deponent regretted that these letters were not before the Court, when the application of the War Department in respect of the portion of the land sold to William Philip was heard, and in which matter, although the Court gave the applicants every opportunity to bring an action to have the title deed of the said land amended, they did not attempt to have this done, but on the contrary withdrew the temporary interdict granted by the Court and allowed transfer to Philip to be passed.

That these letters were not produced owing to deponent's hasty departure for England a day or two after proceedings had been commenced, and that in the hurry of his departure their existence had escaped his memory.

The deponent finally alleged that Colonel Phillips was mistaken in many of the allegations which he had made in his affidavit.

The letters referred to in Mr. Walker's affidavit are as follows:

"A."

Mowbray,
19th December, 1890.

Messrs. Van Zyl & Buissinne,
Cape Town.

Dear Sirs,—Mr. Solomon, Secretary of the M. & S. Railway Company, has handed to me your letter of the 18th inst. re War Department land at the Amsterdam Battery.

It is impossible for me to give any undertaking with regard to the portion a, e, f, g, a.

The submission and award were unconditional, but if the War Department are prepared to refund £450 of the amount paid, and include the small extra area required at Three Anchor Bay free I

think arrangements might be made to allow the War Department to retain the portion a, e, f, g, a at Amsterdam Battery.

Yours faithfully,

JOHN WALKER.

"B."

Cape Town, 22nd December, 1890.

John Walker, Esq.,
Blumendal, Mowbray.

Dear Sir,—We are in receipt of your letter of the 19th inst., and in reply beg to remind you that you distinctly informed the writer, when he told you that it was a question whether more land could be expropriated than was actually required for the railway, that what would not be required was the portion situated on the town side of the line, and that you would not make use, for other than railway purposes, of any of the Amsterdam Battery land situate on the side of the Battery.

When you are asked to put this undertaking in writing you pen the letter under reply, which is a direct contradiction of your verbal communication.

Your proposal cannot, of course, be entertained for one moment, and the position will have to be reconsidered unless you immediately given us the required undertaking in writing.

We are, Dear Sir,

Your obedient Servants,

VAN ZYL & BUISSINNE.

"C."

Mowbray,
23rd December, 1890.

Dear Sirs,—Yours of 22nd in answer to mine of the 19th with me to-day. Whatever I may have told you I certainly never led you to believe that any undertaking would be given as to the land, and as you drew the contract between the company and myself you are aware that any restriction would be at variance therewith.

Besides, I have seen Mr. Tonkin, who states that the valuation put upon the land would have been very different had any reservation been made.

Please put the matter through at once, and oblige,

Yours faithfully,

JOHN WALKER.

The Solicitors to the War Department,
Cape Town.

Mr. Juta, for the respondent company, contended that the applicant was wrong in bringing the matter before the Court in its present form. He referred to the three letters marked A, B and C above and urged that the War Department, through their attorneys, must have known that the land now in question was not intended for railway purposes.

Mr. Rose-Innes, Q.C., in reply, relied upon the judgment of the Court in the case against Walker (*ante* p. 8), and contended that the proposed sale to Cowling was a mere colourable attempt to get behind the previous order of Court. From the broker's note it was clear that the sale was purely for Walker's benefit (*vide* terms of agreement between Walker and the company (8 Sheil at p. 9). When it was discovered that the interests of the War Department were likely to clash with those of the company, Messrs. Van Zyl & Buissinné at once ceased to act for the company.

Walker's proper course was to take steps to have the interdict granted against him set aside.

Mr. Juta in reply.

The Court made the rule absolute.

The Chief Justice, in giving judgment, said: In granting the interdict restraining the company from passing transfer of this land to Mr. Walker, the Court was very careful to state that Mr. Walker would still have an opportunity of showing cause against the interdict being continued. The proper course, therefore, would have been, if any reliance is to be placed upon the letters which Mr. Juta read, for Walker to have applied to set aside the order, and the Court would have given every attention to any argument that could have been urged in favour of discharging the order. It was not a final order, only a provisional one, and the Court would have discharged it, if it could be shown by sufficient evidence that there was no *mala fides* in the contract between the company and Mr. Walker. But instead of adopting this obvious course, the order of the Court is sought to be set aside by a side wind, and a sale effected of this land to Mr. Cowling by Mr. Walker. It is true the broker's note states that the sale is by Mr. Walker, manager of the company, but it does not state that it is in his capacity as manager of the company or on behalf of the company. Now I am inclined to think that the only person who can derive any benefit from the present sale is Walker himself. The third clause of the contract read is, "If more than £750 be required for land to be bought for expropriation purposes, the contractor (Walker) shall pay at, his own personal costs and charges, such sum or sums required over and above the sum of £750, he being entitled to transfer of the excess of land as aforesaid." I am inclined to think that the only person who would derive any benefit from the £1,000 paid by Cowling would be Walker himself. Then he will escape the order of the Court by a side wind, that is, by the transfer to Mr. Cowling. I think, therefore, the rule already granted should be made absolute. It will still be competent for Mr. Walker to come forward and obtain the discharge of the original order. So long as that

DO

order stands, this transfer to Cowling cannot be allowed. It appears to me that the company is as much bound by the interdict as Walker while it stands. The rule must be made absolute.

Mr. Juta asked if the rule was dependent upon the setting aside of the original order by Mr. Walker.

The Chief Justice: If Mr. Walker succeeds in setting aside the interdict the company can sell to Mr. Cowling, or to anyone else.

Mr. Justice Buchanan: I quite concur that the rule should be made absolute, on the ground that this is an attempt to render void the order of the Court and practically amounts to treating with contempt that order, trying, as it does, to get rid of the interdict by a side wind. It is clear from the argument of Mr. Innes that Mr. Walker would reap the benefit of this sale.

Mr. Justice Upington concurred.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Wessels & Standen.]

FRASER V. HEANY AND BARROW. { 1898.
Aug. 10th.

Mr. Searle moved for the attachment *ad fundandam jurisdictionem* of this Court of certain shares in the company known as the Frank Johnson & Company (Limited) belonging to Maurice Heany and Henry J. Barrow, in an action about to be instituted by petitioner for damages for breach of contract.

The matter was allowed to stand over in order that inquiries might be made respecting the interest of the respondents in the shares referred to.

CHAMBERS V. CHAMBERS.

Mr. Graham, on behalf of the petitioner, applied for leave to sue *in forma pauperis* in an action against his wife by reason of her alleged adultery.

The Chief Justice asked who the petitioner was.

Mr. Graham said he was a billiard-marker. The respondent's name was mentioned in the case against Bevern.

The Chief Justice: I should like inquiries made as to this man's means. As I said before, these people pay nothing towards the revenue, and if they have means they should do so.

Mr. Graham said he would make inquiries.

The matter was then referred to counsel.

The Chief Justice: I am of opinion that after what has been proved at the trial Mr. Gabriel is a person entirely unfit to have access to any public documents in this country. As a conveyancer, he would have access to deeds and such documents. As I think him wholly unfit to be allowed to have

such access, I am of opinion that he ought to be struck off the rolls.

Mr. Justice Buchanan: Mr. Graham has correctly stated the fact that at the trial, which took place at the last Criminal Sessions, Mr. Gabriel was found not guilty of benefiting personally by the theft—that is, he was found not guilty of stealing any money. But he was found guilty of stealing a document from the custody of the Master, and he was found guilty of forging receipts attached to an account. He was also found guilty of drawing up the account in a manner by which the Master was defrauded of the fees due to him. The jury found, as Mr. Graham states, that when he forged the documents he had the originals. It was on this ground that he had received no personal benefit, or money, that I gave him the option of paying a fine, instead of submitting him to the degradation of being sent to the convict-station. The conduct of which he was found guilty was, however, such that I quite concur with the Chief Justice, that he ought no longer to have access to public documents, and that he should be struck off the roll of conveyancers. The matter might have been brought before the Court by the Law Society, but that body only deals with attorneys and notaries, not with conveyancers. I thought it my duty when the matter came before me to bring it to the notice of the Court, and I consider Gabriel's conduct to be such that he cannot be allowed to remain longer on the roll of conveyancers.

Mr. Justice Uppington concurred.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.O.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPPINGTON, K.C.M.G.]

GELDENHUYS V. GELDENHUYS. 1898.
Aug. 11th,
14th & 16th

Farm—Joint purchase—Alleged fraud.

This was an action instituted by Nicolaas Johannes Geldenhuys, of Carnarvon, against his son, Jacobus Geldenhuys, of Roodepoort, in the Victoria West district.

The declaration alleged that on or about February 18, 1879, the plaintiff and defendant jointly purchased from Lodewyk F. S. Gresse, for the sum of £2,000, a certain piece of perpetual quitrent land, situate in Victoria West district,

called Roodepoort, being a portion of the farm Springfontein.

That plaintiff paid his portion of the purchase price, to wit £1,000, £600 he paid to Gresse and £400 he handed to defendant in order that he might pay the said sum to Gresse on plaintiff's behalf; the plaintiff also handed over to defendant the money required for payment of transfer expenses, including transfer duty; portion of this last sum, to wit £57 10s., was in respect of defendant's share of the said transfer expenses and duty, and was advanced by plaintiff to defendant.

That thereafter in or about 8th August, 1879, and without plaintiff's knowledge, the said Gresse and the defendant, acting together fraudulently and in collusion for the purpose of defeating the plaintiff's just rights, procured the transfer of the whole of the said farm in defendant's name.

That thereafter the plaintiff entered into possession of the said farm with the defendant, and remained thereupon till on or about 10th April, 1885, when he left the same, the defendant remaining in possession of the said farm.

That the defendant had wrongfully and unlawfully raised a sum of £900 upon the said farm by mortgaging it, as though he were entitled to deal with the whole of the said property, to Messrs. Zou & Katzenstein.

The plaintiff claimed:

(a) That the defendant be ordered to give him free and unencumbered transfer and possession of half of the said farm, he, the defendant, paying off the said mortgagees.

(b) That defendant pay the sum of £57 10s., being the half of the transfer expenses advanced by plaintiff on defendant's behalf, with interest.

(c) Alternative relief, with costs of suit.

Or in the alternative:

(a) Payment of the sum of £2,000, partly in refund of the share in the purchase price paid as aforesaid and the expenses disbursed by plaintiff in connection with the purchase and transfer of the said farm together with interest, and partly for damages in respect of loss of fruits and profits of the half-share of the said farm.

(b) Alternative relief, with costs.

The defendant in his plea alleged *inter alia* that he bought the farm in question for his own account, and not jointly with plaintiff.

That he paid Gresse the sum of £1,000, part of the purchase price, also transfer expenses and duty, no portion being paid by plaintiff.

That there had been no fraud in the transfer, and that he had remained in possession of the farm since the date of transfer.

Wherefore he prayed that plaintiff's claim should be dismissed with costs.

The replication was general and issue was joined on these pleadings.

Mr. Searle and Mr. Shippard appeared for the plaintiff, and Mr. Rose-Innes, Q.C., and Mr. Graham for the defendant.

The plaintiff, his sons, and Mrs. Gresse gave evidence as to the purchase of the farm.

Mr. B. P. Geldenhuys, a younger son of plaintiff, deposed that on the way from a visit to Gresse's farm his father and his eldest brother said they bought the farm Roodepoort jointly. In 1888 he first heard it was bought in his brother's name alone. He remembered his sister (Mrs. Brooderick) asking defendant for a promissory note for the £1,000, but he refused. At the sale of his father's movables in 1885 defendant sent some sheep to be sold. They were not sold, and he did not know if his brother gave his father any money then.

Cross-examined by Mr. Innes: I have a shop now in the district of Fraserburg. I have not contributed anything towards this case. I was thirteen years of age when the sale of Roodepoort was made. I had the conversation with my sister, Mrs. Brooderick, about the promissory note in 1884.

Mr. J. A. Brooderick, son-in-law of the plaintiff, residing in Carnarvon, deposed that from 1879 to 1888 he was frequently in Springfontein, and from that time, as far as he knew, his father-in-law was owner of Roodepoort. In 1888 he heard it was registered in the name of defendant, and shortly, afterwards witness's wife asked him for a promissory note for £1,115. He refused, saying he owed no money, but that he owed the half of Roodepoort. In 1885 an agreement was made by which defendant took up a loan, and gave £170, and he promised to support the old people in lieu of the interest on the money. In 1889, defendant refused an arrangement by which it was proposed he should pay the money, saying again that he owed only the half of Roodepoort. Another attempted compromise in 1890 was a failure.

By Mr. Innes: I hold that my father-in-law is entitled to half this farm Roodepoort. I accused my father-in-law, before the Magistrate, of being frequently drunk. He is noisy when he gets a couple of glasses. He was put under a rule not to get liquor for six months, on my application. When the money was raised, defendant and plaintiff signed a joint bond. I hired Springfontein, and gave the old people a house to live there. Defendant, who was living at Roodepoort, sent them sheep and other things. Defendant offered to take his property away and leave the farm in 1889, but as there was a bond on it, that was not considered.

In reply to the Chief Justice, Mr. Innes said the Divisional Council valuation of the farm was £1,000, and the bond was for £900. The value of the farm, he was instructed, was about £1,200.

Mr. Searle said he was informed that the value of the farm was £1,500.

Alfred Aroher, another son-in-law of the plaintiff, deposed that he accompanied defendant to raise the £170 in 1885. He asked defendant why he did not live at Roodepoort permanently, and he said he was better off at Karreefontein, that he was drawn into the purchase of the farm by Gresse, and had enough to pay in rent without paying interest also. He had many conversations with defendant as to the money he owed to the plaintiff, and the former never denied that he owed it until 1889 or 1890.

Martha Johanna Geldenhuys, wife of the plaintiff, said she understood her husband and her eldest son were co-purchasers of the farm Roodepoort for £2,000, until her son Nicolaas found that the latter was mentioned in the "koop brief" as sole purchaser. Defendant said he did not know how it came to be like that, and promised to give his father an acknowledgment of debt for £1,000. He was often asked for that acknowledgment and always put them off.

Frederick Watt Standen, manager, Standard Bank, Beaufort, produced the books. In March 12, 1878, a fixed deposit of £600 was made in the plaintiff's name by Gresse. That was withdrawn on the 8th April, 1879, by Gresse, to whom Geldenhuys had endorsed the deposit receipt.

For the defence, Mr. Edward William Rice, agent, Beaufort, deposed that the inheritance of £600 was paid on June 26, 1874, to the plaintiff. The "koop brief" put in was in his handwriting. It was his invariable habit to read over and explain these documents when he had drawn them up, and he must have done so in this case.

Jacobus Geldenhuys, the defendant, deposed that up to 1876 he had lived with his father at Springfontein. Then he went to farm on his own account at Karreefontein. He had 1,000 sheep and five or six horses, and was free of debt. He paid £180 a year for the farm on a seven years' lease. He got on well and his stock increased. In 1879 he had 1,800 or 2,000 sheep. At that time he went with his father to see old Gresse who was ill. He agreed to buy Roodepoort, and his father gave Rice the instructions to draw up the "koop brief," which was read over to them. Old Gresse read it over before it was signed in plaintiff's hearing. He paid the transfer dues and costs to his father, who promised he would see everything put in order. He gave his father £600 to be paid to Gresse a short time after the purchase of the farm. The £400 he afterwards paid to Gresse himself. He raised the money by selling 600 sheep, a wagon, a mule, 150 ewes, and a quantity of wool; he also borrowed money. He denied that he told his brother that the farm was bought jointly by his father and himself. In May, 1879, he was sent with Nicolaas to Probart's to get money for his father. He gave all the money and an account

which he also received to his father. He had occupied Rooodepoort from 1879 to 1885, bringing his cattle backward and forward. He gave Nicolaas permission to occupy the house on Rooodepoort. Gresse reduced the bond from £1,000 to £900, and he raised the money to pay that by another bond.

By the Chief Justice : I was not aware of what was in the document which Probart gave me.

By Mr. Innes : When his father was in difficulties in 1885 he passed a bond for £170 to Hugo to assist him, and paid half of it when it was called up. He denied that conversations such as deposed to by his brothers had taken place. He paid half of the £170 bond under compulsion. He and Nicolaas were not good friends. He denied having made the statements alleged to Mrs. Brooderick or to Archer.

By Mr. Searle : Plaintiff was so anxious witness should purchase Rooodepoort, although he had no part in the purchase, because he was afraid it might be bought by some person who would not be a good neighbour. He did not know his father had £600 in the bank, his mother's inheritance. He did not borrow £100 from him. Ludovic was with him when he paid the £400 Gresse, but that was not immediately after coming from Victoria West with the money obtained from Mr. Probart. He could not suggest any reason why about that time his father should raise £600 on Springfontein. All the evidence for the plaintiff was untrue.

Mr. J. Hanau, Wynberg, deposed that he was in Carnarvon from January, 1875, till the end of 1878. He knew all the parties in the case. In 1878 the defendant was in a good substantial position as a farmer, and could have raised £1,000. He had many transactions with defendant, who was the only one of the family worth giving credit to.

Mr. Innes asked what was the general reputation of Nicolaas and the rest of the family in the neighbourhood.

Mr. Searle objected.

Mr. Innes cited *Taylor on Evidence*, section 1,326 and cases there quoted in support of his contention that the question might be properly put.

The Chief Justice said the plaintiff had not been warned of this question. If he were, he might have brought witnesses to prove that he bore a splendid reputation for veracity. Now his case was closed, and he could not do so.

On the suggestion of the Court, the witness was asked if he could state from his own knowledge what the reputation of Nicolaas was as to veracity.

The witness replied that he had no special knowledge on the subject.

Mr. Olivier, who had been co-lessee with defendant of Karreefontein, gave evidence of the number of sheep defendant had in 1879.

By Mr. Searle : We both had lost a lot of stock in 1877, but I lost more than he did.

Jacobus Pieter Hugo stated that he understood Rooodepoort belonged to defendant. He gave evidence respecting the bond for £170.

Mr. S. Cornelis, auctioneer, agent, and Justice of the Peace at Carnarvon, deposed that the rates and taxes on Rooodepoort were paid by defendant. In 1890 he sold Springfontein for plaintiff for £1,255. He settled bonds, debts, &c., and paid the balance over to Nicolaas. He omitted to deduct the £80 bond from it, and when twenty minutes after he asked the old man for it, he said his son had the money, and the son said the old man had it, and between them they swindled him out of the money. He accepted a composition afterwards of 10s in the £.

By Mr. Searle : Nicolaas and Broederick did not say that the £80 should be paid by defendant. I was advised that I could put the old man in gaol. I took £40 because there was no use proceeding against them, as they had nothing. I didn't consider it a fraud so much as a downright highway robbery. (Laughter.)

This concluded the evidence.

The Court found that £1,000 had been paid by plaintiff. The further hearing was postponed until 11th September, to obtain on behalf of the defendant evidence as to the occupation of Rooodepoort, but the case was ultimately settled out of court.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorney, G. Montgomery Walker.]

Ex parte DETTMAR.

{ 1898.
Aug. 15th.

Derelict Lands Act — Application under —
Transfer to executor dative.

This was an application under the Derelict Lands Act of 1882 for an order authorising the Registrar of Deeds to pass transfer to the legal representatives of the late Phillip Hertz of the following land situate in the village of Stutterheim : Lot No. 14, block D ; acre lot No. 12, block B ; building lot No. 7, block D.

The petition set forth that on the 9th January, 1864, Hertz purchased from one Albert Leimke, German military settler, building lot No. 14, block D, and acre lot No. 12, block B, above-mentioned for £8, which was only paid, as appears from the power of attorney, to make transfer, signed by Leimke, dated 9th January, 1864.

That on or about the 4th November, 1864, the said Hertz purchased from Johann Daubermann building lot No. 7, block D, for £5, which was only paid, as appears from the power of attorney, to make transfer, signed by Daubermann, dated 4th November, 1864.

That Dauberman purchased lot No. 7, block D, from George Delins on 11th March, 1864, for £2, as per receipt for transfer duty annexed to petition.

That petitioner found amongst Hertz's papers the original title deeds of building lot No. 14 and acre lot No. 12 aforesaid, granted to Leimke, and the original title deed of building lot No. 7 aforesaid, granted to Delins, with the aforesaid powers of attorney and receipt for transfer duty.

The petitioner alleged that Hertz was in uninterrupted possession of the property from 1864 until his death.

That from search made in the Deeds Office, King William's Town, it appears that lots 14 and 12 were granted to Leimke, and still remained registered in his name, and that lot 7 was granted to Delins, and is still registered in his name.

That petitioner had made inquiry but was unable to find out whether the said Leimke and Delins were dead or alive; that Daubermann was dead, and that in order to administer the will of Hertz it was necessary that the property should be transferred to the petitioner as executor dative in the estate of Hertz.

On the 8rd July a rule nisi was granted, and to-day on the motion of Mr. Graham the rule was made absolute.

[Petitioner's Attorneys, Messrs. Fairbridge & Arderne.]

GLAESER'S EXECUTOR V. QUIN. { 1893.
Aug. 16th.

Goods sold and delivered—Action—Proof of agency.

This was an action instituted by Mr. Marius Augustus Glaeser, in his capacity as executor testamentary of his brother, the late J. J. le Sueur Glaeser, of Worcester, against Mrs. Anna Maria Elizabeth Quin, for the sum of £24 14s. 6d., being the amount due for certain wine and beer sold and delivered by the deceased to the defendant during the years 1885, 1886, and 1887.

The defendant pleaded a general denial of the debt.

Mr. Graham appeared for the plaintiff.

Mr. Joubert, for the defendant, asked for a postponement of the case in consequence of the inability of the defendant to be present, owing to temporary mental incapacity. As several witnesses had arrived from Worcester, the Court heard their evidence.

The plaintiff, Mr. M. A. Glaeser, deposed that he was executor testamentary in his brother's estate. His brother was a wine merchant and kept a bar in Worcester. Knew the defendant, and

that she entertained largely. The orders for liquor put in were found amongst his brother's papers, and appeared to be signed by defendant and her daughter, who was now dead. Witness did not know the signatures.

Mr. G. I. Roos, barman of the deceased, recognised the orders. Defendant had given instructions that liquor was only to be supplied on written order. Could not swear to C. Quin's signature (defendant's daughter, now deceased). Defendant and her servant came for liquor, and sometimes strangers. The last account rendered to defendant was on 12th October, 1887, for £25 Os. 11d. Defendant signed an acknowledgment of debt on which she paid 5s. on the 21st June, 1888, and 5s. on the 17th August, 1888.

By the Court: Could not account for the difference between the last account rendered for £25 Os. 11d. and the amount appearing to defendant's debit in the books £88 14s. 6d. Some of the liquor was consumed on the premises by those who brought the orders.

Mrs. R. Christian deposed that she had brought orders similar to those produced to Glaeser's, upon instructions received from defendant.

Mr. A. Rhodus, butcher, and Mrs. E. Joubert, shopkeeper, both of Worcester, deposed to receiving orders from the defendant on pieces of paper similar to those produced.

This closed the plaintiff's case.

Mr. Joubert applied for absolution from the instance, as there was no proof that Miss Quin was her mother's agent, or that she had authority to sign any of the orders produced.

The Court declined to grant absolution, and ordered the case to stand over *sine die* for the defendant's evidence.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorneys, Messrs. Reitz & Herold.]

FLURIAN V. COLONIAL GOVERNMENT.

WRIGHT V. COLONIAL GOVERNMENT.

On the motion of Mr. Juta, these cases were removed for trial to the Eastern Districts Court.

DIXON V. DIXON.

The hearing of this case was postponed until 12th September, to enable the defendant to plead. The return day of the citation was also extended to the same date.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

JEAREY V. JEAREY. { 1898.
Aug. 16th

Judicial separation — Action — Insufficient
proof of cruelty.

This was an action for judicial separation instituted by Mrs. Elizabeth Annie Jearey against her husband, Daniel James Jearey, on the grounds of his cruelty and ill-treatment.

The declaration alleged that :

1. The plaintiff and the defendant were lawfully married in community of goods in St. Saviour's Church, Claremont, on or about the 28th day of May, 1876, and the said marriage is still in full legal force and effect.

2. There has been issue of the said marriage eight children, all of whom are minors.

3. On divers occasions during the years 1891 and 1892, but more particularly in the month of January, 1898, the defendant wrongfully, unlawfully, and cruelly struck and otherwise ill-treated the plaintiff, and has so abused, threatened, and intimidated her, that it has become impossible and insupportable for her to continue to live with him as his wife.

The plaintiff claims :

(a) A decree of judicial separation *a mensa et thoro* between herself and the defendant.

(b) A division of the joint estate.

(c) The custody of the minor children, the issue of the marriage.

(d) That the defendant be ordered to contribute the sum of £7 per month for the maintenance and education of the children of the marriage until they shall respectively have attained the age of sixteen years.

(e) Alternative relief with costs of suit.

The defendant in his plea admitted paragraphs 1 and 2 of the declaration.

He denied specifically each and every allegation in paragraph 3, and said that he lived happily with his wife, the plaintiff, during the years 1891 and 1892 ; that in or about the commencement of 1898, owing to ill-health, he gave up his business and opened a boarding-house, of which the plaintiff has the management ; that he has always treated the plaintiff properly ; and that he is desirous of living with her, and of supporting her if she will amend her conduct ; and that he is willing and ready to support the children of the marriage as hitherto ; but that for the past five

months the plaintiff has refused to cohabit with him ; she has behaved herself with undue familiarity to certain of the boarders, and particularly to one Jones ; that she has struck the plaintiff and squandered the common estate ; and that plaintiff is the cause of any unhappiness that may arise between herself and defendant.

Wherefore he prayed that the plaintiff's claim might be dismissed.

The plaintiff, in her replication, admitted that since January, 1898, she had refused to cohabit with the defendant, by reason of his cruelty and ill-treatment. She denied that she had behaved with undue familiarity to any person or persons, as alleged in paragraph 2 of the plea. She said that if she struck the defendant she did so in self-defence. She denied that she had squandered the common estate, and that she had been the cause of the unhappiness which existed between herself and the defendant.

Save as aforesaid, she denied the allegations contained the plea, joined issue with the defendant thereon, and again prayed for judgment, with costs.

Mr. Sheil appeared for the plaintiff, and Mr. Searle for the defendant.

Mrs. Elizabeth Annie Jearey (*née* Bailey), the plaintiff, examined by Mr. Sheil, deposed that she was married on May 28, 1876. After marriage, she and her husband started a public-house, the Waterford Arms, in Loop-street, where they remained five years. Then, after fifteen months in Newlands, they took the Royal Duke Hotel, in Loop-street, which they kept for ten years. They then took a boarding-house. Her husband had ill-used her all through their married life, but during the last two years his conduct had been much worse than formerly. He struck her and dragged her by the hair, and knocked her head against the wall. On the 1st January last, she and her sister were going to Newlands to see her mother, and when she went into his room he tried to strike her, and said he would shoot both herself and her sister, and used most violent and filthy language. She returned from seeing her mother in the afternoon at 6.30. They were packing some things for a picnic next day, when defendant caught her by the hair, and knocked her violently against the door. He was very much intoxicated in the morning. She looked herself in the sitting-room after the assault. Defendant was angry because, being asleep, he had not come to dinner. His dinner was in the oven. He burst open the sitting-room door, and seizing her by the hair, tried to drag her to his room. Some of the boarders and her sister then came down, and defendant went to his room. She refused to occupy the same room with him that night, and slept with her sister until the latter left to be married in February. Since that time

she had not occupied the same room with her husband, because she was afraid. He nearly smothered her one night. Her children slept with her now. He often came home intoxicated.

By the Court: We live under the same roof, but take our meals separately. I have five boarders.

Examination continued: The boarders paid 22s. 6d. per week, out of which she had to pay for washing. The rent of the house was £10 a month. She paid everything up to the time her husband put an advertisement in the paper that he would not be responsible for her debts. She never had the administration of the common estate; defendant always kept the money under lock and key. All the money she got was from the boarders. Her husband sold some property in Leenwen-street, for which she heard he got £500. Of that he gave her only £5 to buy boots for her children. She denied that she had been unduly familiar with any of the boarders. She had not been familiar with Jones. In self-defence she had pushed defendant, but did not hurt him. She had done nothing to cause this unpleasantness, and had always done her best to please her husband, but he was too bad-tempered. He had property at Newlands; two detached cottages, the rents of which he received. She was anxious to have the custody of the children if he would help to support them.

By the Chief Justice: He does not ill-treat the children, but he uses bad language before them.

Cross-examined by Mr. Searle: I know defendant had a revolver in the house at the time he said he would shoot me, but he did not produce it. Mr. Cannon, my brother-in-law, saw defendant strike me on January 1. He jumped up and struck me without any quarrel previously. Her third son was present when her husband struck her in May. About Christmas, 1891, he gave her a black eye. I took the boarding-house in September last, and have paid the accounts for rent, &c., except for the past two months. Defendant did not complain to me about my conduct with Jones. He had only thrown out insinuations. When I spoke to the children in any way he would tell them to tell me to speak to Mr. Jones. He has never found me sitting in the front room on the sofa with Mr. Jones's arm around my waist. If Mary Coffey and Johanna Cornelis, the servants, say that occurred it will not be true. Jones is a tailor, and has a room opposite the boarding-house. I do not go over there for hours, and do not walk about with him in the evenings. Jones has not in my presence struck my husband, but has thrown a cup of coffee at him. In June when Mr. Faddell and Mr. Dixon came to look over the house, I did not in their presence strike defendant and give him a black eye. The black eye was caused by his falling out of bed during the night.

By Mr. Justice Buchanan: Jones is still a boarder.

In further cross-examination, she said she knew nothing of a complaint of her husband's that his cash box was broken open. The three eldest boys were working, getting £2, £1, and £1 15s. a month respectively.

Re-examined: Defendant did not beat her in the presence of other people. She got into debt because she only had two boarders, the others having left on account of her husband's abuse. She charged the woman Cornelis in the Magistrate's Court for striking her child, and she was fined 10s. When the men were looking over the house defendant rushed at Jones with a penknife in his hand because the latter resented an inspection of his room, and she interfered. She did not give defendant a black eye.

Mrs. Edith Cannon, sister of plaintiff, deposed that before her marriage she lived from October, 1892, to February, 1898, with her sister. Plaintiff and defendant lived very unhappily together. She saw defendant frequently try to strike plaintiff and drag her by the hair. She corroborated plaintiff's evidence with reference to what occurred on January 1. She saw defendant carried home drunk on Christmas Day last year. He used very bad language before the children. Defendant did not go to the picnic on January 2 because he was getting sick pay from a club, and while he was getting that he could not go out to a picnic.

The Chief Justice: Did Mr. Jones go to the picnic?—Yes.

By Mr. Justice Upington: None of our family like the defendant, but he would have gone with my sister and myself to Newlands, but for getting sick pay from the club.

The Chief: Did he object to his wife going to the picnic? No, he did not object; he only said he hoped the cart would capsize.

I suppose that was because Mr. Jones was in the cart?—No, he said nothing about Mr. Jones.

For whose benefit did he wish the cart to capsize?—I don't know.

Henry John Cannon, husband of the last witness, deposed that he lived as a boarder in the house. He had seen defendant ill-treat his wife. He drank and used bad language. He never observed the plaintiff familiar with Jones or any other man. He heard defendant accuse plaintiff of being unfaithful to him with every one of the boarders.

The Chief Justice asked was it likely after what occurred that these parties would live amicably together?

Mr. Searle said he did not think so, but defendant denied all these charges, and appeared to be an inoffensive man. He wanted plaintiff to give up the boarding-house and boarders.

Stewart Crawford, another boarder, deposed

that Jearey and his wife lived miserably together. Defendant was a very cantankerous man. He seemed to find as much fault as possible with the boarders, and annoyed and abused his wife. He never saw him use violence towards her, but heard him threaten to do so.

John Henry Jones gave corroborative evidence. He declared there was no truth in the statement that he ever sat on the sofa with Mrs. Jearey. He never encircled her waist with her arm, and had never walked out with her at night. He had met her several times, especially on Sunday nights, but never by appointment. He had thrown a cup of coffee at defendant for using foul language towards him at the breakfast table. He had charged witness with being unduly familiar with his wife. He worked opposite, but Mrs. Jearey did not come across during the day, nor did he go over to her except for his meals.

Mr. Justice Upington: Looking back at the matter now, don't you think that you ought to have left that house?—Yes, but I was influenced by the other boarders, and the house was so convenient for my work I put up with it.

By Mr. Sheil: I had heard other boarders accused as well as myself of being unduly familiar with the plaintiff.

Daniel James Jearey, the defendant, deposed that before he and his wife took the boarding-house they lived happily together, like two young pigeons. He was subject to epileptic fits. He denied all the charges of cruelty, and had never struck his wife. He had not struck her. She was too strong for him. Their life had been unhappy since Jones came to the boarding-house.

—Q. Why did that cause the unpleasantness?—A. Because he was a better looking man than I, I suppose. He was more thought of than I. My wife liked him better than me because he was a Welshman, and I was born in Cape Town. Defendant further stated that he had reason to complain of his wife's conduct with Jones, and had spoken to both about it. When he came home sometimes, and opened the parlour door, he would find Jones and his wife sitting on the sofa, with his arm round her. He spoke about it, and she said, "If you don't like it you can leave it alone." On the occasion when Mr. Faddell and Mr. Dixon came to look at the house, his wife blacked his eyes and tore his shirt. She went over to Jones's workshop during the day and helped him to make button-holes. His wife managed everything but he had to pay the bills. She had struck him on several occasions. The quarrels were all about Jones. At the time the coffee was thrown he had said that some one told him his wife was seen walking with Jones. If the boarding-house were given up they could live happily. The lease would expire at the end of this month. He denied that he rushed violently at his

wife, or that he tried to smother her. On the contrary she was big enough to smother him. He was willing to support his wife and would start a shop or an hotel. He was anxious that the boarding-house arrangement should not last.

The Chief Justice: Why do you object to the boarding-house? Are you jealous of your wife?—I am not jealous but I don't half like it. If Jones left I would be satisfied to have the boarding-house.

In cross-examination by Mr. Sheil, defendant admitted that he might have struck plaintiff and pulled her by the hair. He drank sometimes, but not worth talking about. It didn't take much to make him drunk. He did no work now.

By the Chief Justice: I have £160 in the house, and two houses at Newlands not mortgaged.

Re-examined: He lost money in Doornfontein and Aurora West shares. His cash-box was broken open and £100 taken. He found the marriage certificate which had been in the box in his wife's room.

By the Chief Justice: There was about £40 in the cash-box.

Defendant said he had an epileptic fit recently, and his memory was affected.

— Mary Coffee, a coloured woman, deposed that she had been in plaintiff's service. She never saw defendant strike his wife, but saw his wife strike him. There were always rows about Jones. She saw Mrs. Jearey and Mr. Jones sitting in the dining room with her arm around his waist and his arm around her neck. The door was shut. Plaintiff showed her a shirt of the master's which she had torn, and said that she had beaten him.

In reply to Mr. Sheil, she denied that she had been offered any money for giving evidence.

Jehanna Cornelis, a coloured girl, gave similar evidence.

In cross-examination by Mr. Sheil, she admitted that she had been fined by the Magistrate on a charge brought by the plaintiff, and that she was the mother of an illegitimate child.

Joseph Faddell deposed that he knew the defendant for thirteen years. He was a good-tempered man, like a child, always laughing and playing, and very weak-minded. He asked plaintiff to make up with her husband on one occasion, and she said she would drown herself rather than make it up. She did not then complain of her husband's ill-treatment of her. When he went to the house with Dixon he saw Mrs. Jearey strike the defendant in the face with her clenched hand. Jones, who was present, said he would break defendant's skull yet if he touched Mrs. Jearey. Witness then said it was like "rough on rats" in there, and he came away.

Cross-examined by Mr. Sheil: He never lived in the same house with plaintiff and defendant. Jearey did not drink, except some peppermint.

Witness himself drank anything—all Italians drank—especially wine. Plaintiff struck her husband without provocation. He denied that he advised Jearey to shut up the house and send his wife away.

George Dixon, a Greek, gave corroborative evidence.

Mr. Sheil having been heard for the plaintiff, and Mr. Searle for the defendant,

The Chief Justice, in giving judgment, said: I do not think in this case that the plaintiff has proved such continued ill-treatment, or such habitual drunkenness as would justify the Court in granting a decree of judicial separation. There is no doubt that there have been occasional acts of violence on the part of the defendant. The same thing may, however, be said with regard to the plaintiff, and I think she generally was in a position to give the defendant back as much as she received. The defendant appears to me to be a very weak-minded man, and physically weak also. It seems that for many years he has suffered from epileptic fits, and we all know what effect such fits have upon the mind of the patient. I do not think that the defendant was physically capable of being so cruel as he has been represented to be. I can understand that the plaintiff would be anxious to be parted from the defendant who is in such a condition, but she has taken him for better or worse, and must now bear with his ailments, and she cannot come into Court for a judicial separation because on one or two occasions he has been somewhat unkind to her. She has, in my opinion, given him occasion for that unkindness. I think if Mr. Jones had not been living in the house, or if he had left, the parties would have lived happily together. The defendant, rightly or wrongly, was jealous of Mr. Jones, and under the circumstances it would be better for the plaintiff to get rid of Mr. Jones, and live peaceably with the defendant. Instead of that, whenever a quarrel arose, she took the part of Mr. Jones instead of taking the part of her husband, as she ought to have done. I do not for one moment say that there was any improper familiarity between the plaintiff and Mr. Jones, but at the same time there was such familiarity as would occasion jealousy on the part of defendant. Under these circumstances, having come to the conclusion that there was not such cruelty as would justify the Court in giving a decree of judicial separation, the case must be dismissed. The defendant has already paid £16 towards the costs, and if there is anything else to be paid it will come out of the common estate.

Mr. Justice Buchanan: I concur in the decision.

The Chief Justice expressed the hope that the parties would now endeavour to live peaceably together. It would be a great pity to break up their home. If the Court had given judgment for

a separation it would have been very difficult to dispose of the custody of the children. The defendant was too weak-minded a man to give their control to, and the wife would be a fit and proper person to take charge of them, but the husband would be entitled to their custody. Therefore, under these circumstances, he thought it would be far better for these people to remain together as husband and wife.

Mr. Justice Upington: I think it is a great pity for the children. This is not a charitable world, and this case will be raked up against them some day or other.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorney, H. P. du Preez.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.O.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.O.M.G.]

STANDARD BANK V. JACOBS AND { 1898.
ANOTHER. { Aug. 17th.

Mr. Molteno moved for provisional sentence for £299 5s. 6d., with interest at 8 per cent. from the 1st December, 1890, upon a promissory note.

Provisional sentence granted.

THE MASTER V. STONE'S EXECUTOR.

Mr. Giddy moved for an order calling upon the respondent to file his account in the estate.

The usual order was granted.

POSNO V. ALLEN.

On the motion of Mr. Currey, the final adjudication of the defendant's estate was decreed.

SCHROEDER V. ABU BEKER EFFENDI.

Mr. Castens moved for judgment for £12, less £7 paid on account since the issue of the summons. Granted.

Ex parte POS.

Mr. Sheil moved for the admission of Mr. Meindert Pos as a translator in the English and Dutch languages.

Mr. Pos took the oath and was duly admitted,

REHABILITATIONS.

The following rehabilitations were granted on motion from the Bar :

Isaac Jacobus van Heerden, Wessel Johannes Zietsman, and Daniel Jacobus Raubenheimer.

HORN V. HORN.

Mr. Graham moved, on behalf of the petitioner, for leave to sue *in forma pauperis* in an action against his wife for restitution of conjugal rights, failing which for divorce, by reason of her malicious desertion.

Referred to counsel.

CHAMBERS V. CHAMBERS. { 1898.
Aug. 17th.

Pauper.

Where an application is about to be made to the Court for leave to sue in forma pauperis it is the duty of the attorney to satisfy himself that the petitioner is really a pauper before moving in the matter.

Mr. Graham mentioned the case of Chambers v. Chambers, an application on the part of the husband for leave to sue *in forma pauperis* in an action for divorce which had been referred to him. He had made inquiries, and found that Chambers was practically a pauper. Counsel read the petitioner's affidavit, in which he alleged that he had no property, movable or immovable, that he only received £6 a month as a billiard-marker, and that being married in community he was liable for his wife's debts, and had already been sued for £18 odd, being liability incurred by her, and that he anticipated further claims being made against him.

Mr. Graham asked for a direction of the Court as to the duty of counsel in pauper petitions, viz., whether he should make special inquiry as to the circumstances of the petitioner, or whether he was bound by the certificate of the two householders.

The Chief Justice said that counsel should use his discretion, but it was the duty of the attorney to make inquiries and satisfy himself that the petitioner was really a pauper before moving in the matter. Pauper suits were really becoming almost a scandal. The Court was being turned into a pauper divorce Court, the revenue derived no benefit, and divorce was made cheap and easy.

Mr. Justice Buchanan said that counsel to whom the matter was referred should act as a kind of assessor to the Court, and see that no fraud succeeded.

Mr. Justice Upington said he was greatly afraid there was collusion in many of these cases of malicious desertion.

[Plaintiff's Attorney, J. Hamilton Walker.]

In re WOLFF V. WOLFF. { 1898.
Aug. 17th.

Practice — Process — Service — No proof of change of domicile.

In the absence of evidence that a defendant had acquired a new domicile the Court directed service of process at his last known place of residence.

Mr. Sheil moved for the direction of the Court as to the service of process in the above suit.

The summons, in an action for restitution of conjugal rights, was issued on 17th July, 1893, and was handed by the plaintiff's attorney, together with copy of declaration and notice to plead, to the Deputy Sheriff, Cape Town.

The Deputy Sheriff made the return "that after diligent search he had been unable to find the defendant, and that he had been informed that he had gone to Kimberley."

The plaintiff's attorney alleged that he had been informed by the plaintiff that she had never heard of her husband having gone to Kimberley, that his parents reside in Caledon-street, Cape Town, and that the defendant used to reside with them until he left.

That it was necessary that the direction of the Court should be obtained as to what manner of service should be made.

The plaintiff in her affidavit alleged *inter alia* that up to the time her husband left Cape Town he lived with his parents in Caledon-street.

That he left Cape Town in November, 1892, and that she had not since heard where he was.

The Chief Justice said: In the absence of evidence that the defendant has acquired a new domicile, service at his last known place of residence will be sufficient service for the purposes of this suit.

[Applicant's Attorney, J. Hamilton Walker.]

IN THE ESTATE OF THE LATE
COENRAAD B. NOLTE AND HIS SUB-
SEQUENTLY DECEASED WIDOW. { 1898.
Aug. 17th.

Mr. Juta moved for authority to Jan H. Nolte to transfer the landed property in the estate, situated in the district of Fraserburg for the sum of £700 to such of the heirs in this colony as are prepared to pay their proportionate amount of the said purchase price. Affidavits having been read,

The Chief Justice said they would postpone a decision in the matter for information as to the relative values of the two farms at the time of the testator's death. They would also require service of the notice of motion on the guardian of the minor children of Willem Nolte.

LEEN V. LEEN.

Mr. Castens, on behalf of petitioner, applied for leave to sue by edictal citation in an action about to be instituted by petitioner against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion, and for the custody of the minor child of the marriage.

An order was granted, the citation to be returnable on the 1st of November, personal service to be made if possible, failing which one publication in the "Government Gazette."

In re THE CAPE STOCK-FARMING COMPANY, IN LIQUIDATION. *Ex parte* BRUGMAN. { 1898.
Aug. 17th.

Mr. Sheil presented the report of the official liquidator of the above company, asking for the sanction of the Court to a compromise proposed to be effected with a contributory.

It appeared from the report that Mr. Murdo MacDonald is a holder of fifty-one shares in the company, upon which is due a call of £1,275. That the said MacDonald is incapable of meeting the call, and has offered a cash payment of £800, which has been guaranteed (an account attached to the report showed MacDonald's liabilities to be £20,880 19s. 11d., and his assets £15,400).

The liquidator alleged that before deciding upon the acceptance or otherwise of the said offer, he had made inquiries both in the Colony and England, through the liquidators there, as to the position of the said MacDonald.

That after due consideration of the statement and information so obtained, it was decided with the concurrence of the liquidators in England to recommend to the Court the acceptance of the offer of compromise, as being in the interests of the company.

The liquidator prayed for the Court's sanction of the said compromise of £800 in full settlement of all present and future claims against MacDonald in respect of the shares held by him in the company.

There was a certificate from the official liquidator attached to his report that MacDonald's statement of assets and liabilities, together with his affidavit as to its correctness and the further annexures, had lain open for inspection at the office

of the Midland Agency and Trust Company, Graaff-Reinet, for a period of fourteen days, reckoned from the 22nd July, 1898, inclusive.

The Court sanctioned the proposed compromise.

[Attorneys for the Company, Messrs. Van Zyl and Buissinne.

Ex parte PILLANS. { 1898.
Aug. 17th.

Holograph will—Ordinance 15 of 1845—Witnesses.

Witnesses to a holograph will can only be dispensed with where the testator has distributed his property amongst all his children.

This was an application for authority to the Master to issue letters of administration to the petitioner, Charles Edward Pillans, as executor testamentary of the estate of the late Alida Dorothea Pillans.

It appeared from the petition that the petitioner's mother, the late A. D. Pillans, died on the 9th August last, and left three last wills and testaments, dated respectively, March 19, 1884, September 22, 1892, and July 6, 1898, all of which have been filed with the Master.

That the first-dated will was signed and executed by the deceased in the presence of two witnesses as required by law. The will dated September 22, 1892 was written in the handwriting of the deceased, and signed by her, and was attested by one witness, and the will bearing date July 6, 1898, was also holograph of the deceased, and was signed by her, but her subscription thereto was not attested by any witness.

That by the last mentioned will the petitioner and his two brothers were appointed executors of the deceased's estate and effects.

That the petitioner is the only executor nominated in the said will now resident in the Colony; that he applied to the Master for the usual letters of administration, but that the Master refused to grant letters of administration on the grounds that the will appointing the petitioner one of the executors had not been executed in terms of the law.

The petitioner prayed for an order directing the Master to issue to him letters of administration.

The petitioner, in his affidavit in support of the petition, deposed that being well acquainted with his deceased mother's handwriting, he verily believed that the wills dated 22nd September, 1892, and 6th July, 1898, referred to in the petition, were, with the exception of the signature of the witness to the former, entirely in the handwriting of the deceased.

In the last two wills of the testatrix her sons were excluded from all benefits.

Mr. Graham was heard in support of the petition, and cited the following authorities: *Van Leeuwen's R.D. Law* (Kotzé's translation, vol. 1, p. 324), *De Wet's Case* (Buch., 1876, p. 119), *Executors of Eaton v. Eaton* (Buch., 1876, p. 178), and *Robb v. The Master* (8 Sheil, 129).

The Chief Justice: To the Wills Ordinance, under which wills are executed in this colony, certain exceptions have been allowed, but the Court cannot permit any cases to fall within these exceptions unless in every respect they comply with the exceptions. The Court has decided in the case of *De Wet*, that where the testator has written the will with his own hand and has distributed his property among his children, in that case witnesses may be dispensed with. But the Court cannot see its way to hold that when the testator distributes his property among some of his children and entirely omits others, in that case the exception would apply. I understand the exception applies only to those cases in which the distribution takes place among all the children. The Court, therefore, cannot give effect to the two last wills. The first will is clearly in order, and the Court can only give effect to it, and cannot appoint an executor under the two last wills. There will be no order on the present application. Their lordships concurred.

[Applicant's Attorneys, Messrs. C. & J. Buissonné.]

METROPOLITAN AND SUBURBAN { 1898.
RAILWAY CO. V. DE VILLIERS. { Aug. 17th.

Railway company—Negligence—Act 19 of 1887, Section 30.

The plaintiff's cow, which was lawfully grazing on a commonage (in the suburbs of Cape Town), which was separated from the defendant company's railway line by a fence, escaped on to the line through a gate, which it was the company's duty, under the 30th section of Act 19 of 1861, to keep closed.

The cow was killed in the day-time by a passing train.

Held, in the absence of any proof that precautions were taken by those in charge of the train to prevent the accident, that there was evidence of negligence to justify a verdict in the Magistrate's Court for the plaintiff.

Held, further, that as the plaintiff might

reasonably have believed that the gate would have been kept closed by the company, there was no proof of contributory negligence in allowing the cow to graze unattended on the commonage.

This was an appeal from a judgment of the late Resident Magistrate of Cape Town in an action in which the present respondent (plaintiff in the Court below) sued the appellants for £15, being the value of a certain cow run over and killed by the defendant company.

The summons alleged *inter alia* that on or about the 25th day of January last, the defendant company, by their duly authorised agents, at or near the Three Anchor Bay crossing, wrongfully and negligently ran over and killed a certain cow, the property of the plaintiff, of the value of £15.

That by reason thereof the plaintiff had suffered damage to the amount of £15, for which she prayed judgment with costs.

The defendants in their plea denied the debt.

The evidence of the plaintiff went to show that she had paid £20 for the cow, and that it was in the habit of grazing on the Sea Point Common.

Evidence was also led showing that the gates at the crossing near which the cow was killed were constantly open.

The following evidence was given for the defence:

Charles Bernstein, sworn, states: I am guard of the railway. I was in charge of the train. I remember the cow being run over. In coming down the cutting the vacuum brake was applied, I applied my brake, and I then found that the cow had been run over. The gates near there were open. They were shut twenty yards from the spot. I never tried to shut them.

John Walker, sworn, states: I am in charge of this line of railway. When the gates are open they are shut against the railway, and animals cannot get up the line.

The Magistrate gave judgment for £15 with costs.

The company now appealed.

Mr. Juta was heard in support of the appeal. He contended that there was an entire absence of proof of negligence on the part of the defendant company, and that the only remedy against them was by action at the suit of the Attorney-General. He cited *The Liquidator Cape Central Railways v. Nothing* (8 Juta, 25) and Act 19 of 1861, section 29.

Mr. Graham, for the respondent, urged that there was sufficient evidence of negligence to justify the Magistrate's judgment. He cited Act 19 of 1861, section 30, compared the present case with *Nothing's*, and relied on *Fawcett v. York and N.M. Railway Company* (12 Q.B.R., 610), as being directly

in point. He also referred to *Pollock on Torts*, p. 176, to *Atkinson v. Newcastle Waterworks Company* L.R. 2, Ex.Div. 446), and to *Vallance v. Falle* 13 Q.B.D., 109).

Mr. Juta in reply.

The Court dismissed the appeal.

The Chief Justice said: The claim in this case was entirely based upon the alleged negligence of the defendant's servants in running a train against the plaintiff's cow. The summons does not allege that the negligence consisted in not keeping the gates on the road crossing the line closed, and there is therefore no necessity to consider how far the mere fact of such gates having been kept open, in contravention of the 80th section of Act 19 of 1861, imposes a liability on the defendant company for the loss of the cow. I would only observe that the decision in the *Central Railway's Case* (8 Juta, 24); upon which the defendant's counsel mainly relied, is not conclusive on the present appeal. There the question arose as to a contravention of the 29th section of the Act. The Court held that that section provided the only remedy for the non-fencing of the line, and that, without some proof of negligence, independently of the contravention of the Act, the respondent would not have been entitled to recover for the killing of his cattle by a passing train. In the High Court of the Orange Free State the question as to the liability of the Cape Government for damage done to cattle by passing trains was raised and discussed in the recent case of *De Scally v. Siewwright* (17th November, 1892), absolution from the instance was granted on the ground that the law of the Orange Free State placed no obligation on the defendant to provide gates and keep them closed, and confined the liability to cases of cattle killed during the daytime. The Court appears also to have held that there was contributory negligence on the plaintiff's part in not taking precautions to prevent the accident. By the 80th section of Act 19 of 1861 the duty is imposed on the defendant company to maintain gates across public roads on each side of the railway, and to keep such gates constantly closed except during the times when animals or vehicles have to cross the railway. The road now in question crosses the commonage where the plaintiff's cow daily grazed. A fence separates the commonage from the railway line. The plaintiff might fairly have believed that the defendant company would do their duty and keep the gates closed. She cannot therefore be held to have been guilty of contributory negligence in not keeping a herd to look after her cow, nor indeed is the defence of contributory negligence raised. The only question therefore is whether there is evidence of negligence on the part of the defendant's servants in charge of the train. Only the guard was called as a witness and his evidence

was very meagre. It does not appear that any precautions were taken to ascertain whether there was any animal on the line or that the whistle was sounded to drive off the cow. It was broad daylight, the distance between the two stations was short, the train was passing a commonage at a point where the defendant's servants ought to have known that the gate was often left open, and therefore it is impossible to hold (whatever might be said as to the duty of engine-drivers in places less populous than Sea Point) that there was no negligence on the present occasion.

The appeal must therefore be dismissed with costs.

Their lordships concurred.

[Appellants' Attorneys, Messrs. Wessels & Standen; Respondent's Attorney, C. C. Silberbauer.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN and Mr. Justice UPINGTON.]

ALEXANDER V. DE VILLIERS. { 1893.
Aug. 18th,
21st, 22nd.

Architect—Professional services—Fees—
Alleged neglect of duty.—*Quantum meruit*.

This was an action instituted by Mr. George Murray Alexander, architect, of Cape Town, against the Rev. Isaac F. A. de Villiers, in his capacity as chairman of the Building Committee of the Dutch Reformed Church at Goudini, for the sum of £150, being the balance due to the plaintiff in respect of certain professional services rendered by him to the defendant in the erection of the Dutch Reformed Church at Goudini, in terms of a contract entered into between the parties in September, 1890.

The defendant admitted that a contract was entered into between himself and the plaintiff, by which the latter undertook to render his services as an architect in and about the erection of the said church; but he said that the said services included not only the framing of designs and specifications, but the calling for tenders and arranging for contracts for the work on behalf of the committee, and the inspection and supervision of the work whilst in progress; and it was further specially agreed, as part of the contract between the plaintiff and the defendant, that the plaintiff should from time to time, after inspection of the

work, grant his certificate to the contractors with reference to work duly completed by them, and that payment to the contractors should be made by the defendant upon the plaintiff's certificate, and not otherwise.

The defendant further alleged that in terms of his contract it became, and was, the duty of the plaintiff as an architect to use all due diligence and professional skill in and about the preparation of the plans and specifications, the calling for tenders and arranging the contracts for the work, the supervision and inspection of the said works while in progress, and the granting of his certificates to the contractors from time to time. Yet the plaintiff wholly neglected his duty under the contract in the above respects, and so negligently, wrongfully, and unskilfully performed his part of the said contract that the defendant was put to and suffered great loss and damage in consequence.

The defendant submitted to the Court certain particulars, in which he alleged the plaintiff failed to carry out his duty with due skill and diligence as an architect; prayed that the plaintiff's claim be dismissed with costs, and claimed in reconvention the sum of £500 damages with costs.

Mr. Searle and Mr. Graham appeared for the plaintiff, and Mr. Rose-Innes, Q.C., and Mr. Shippard for the defendant.

Mr. George Murray Alexander, the plaintiff, deposed that he was in practice as an architect in Cape Town. On September 11, 1890, he received a letter from Mr. De Villiers, chairman of the Building Committee, Goudini, asking for plans for a church to seat 500 people, with vestry attached. He replied on September 18 asking for particulars of site and other information. On the 22nd the defendant wrote saying they only intended laying the foundation at present and required only a preliminary sketch for the purpose, and asking him to personally survey the ground. As a result of further correspondence, he visited Goudini and inspected the site in company with several members of the Building Committee. They agreed upon the site and he furnished tracings of plans (produced), ground plan and front elevation of the church. These plans were approved of. On October 24 he had an interview in Cape Town with Mr. De Villiers with reference to the ventilation. He recommended a system of automatic ventilation. Early in January he visited the place at the request of the Building Committee and found Mr. Higgo, of the Paarl, at work on the foundations.

By the Court: They had started the work without my presence or knowledge. It is usual for an architect to be present when the foundations are laid. The arrangement was that I should get five or ten guineas for the ground plans, but if I went on with the work, I should forego that, and receive 5 per cent. on the cost of the building.

Examination continued: The foundations were wrong, and he got them put right. He sent down ventilation air gratings, which were put in. He never gave any certificate with regard to the foundations. In January their work was not sufficiently advanced to enable him to see if his suggestions, with reference to ventilation, were going to be carried out. On the 21st August, 1891, he received a letter from the Building Committee asking for further plans, and also if he would be willing to go down for occasional inspection of the work. He replied that he was willing to do so, and would have the plans prepared in a fortnight. He understood that his terms of 5 per cent. on the total cost and travelling expenses at £8 8s. a visit were accepted. He prepared the plans, drawings, and specifications produced. He visited the work on the 28th October, 1891, at the invitation of the committee. The work was considerably advanced. A short time previously he had, at their request, procured a tender for them for the timber work, which he understood was not accepted. On October 28 the walls were up to window-sill level. The work was being done by Mr. Whitehead, whom he did not know. He was surprised to see the building was stone-work, when it was intended to be brick-work. He pointed out that the ventilating flues had not been put in. He did not object to the substitution of stone for brick; he had no right to do so. He pointed out some trifling irregularities which Mr. Whitehead said were not worth altering, as it would put the committee to expense. [A mass of correspondence with reference to the contracts was then put in.] He never told the committee that the whole cost of the building would be £2,000. A tender for woodwork, &c., was put in by Messrs. Mitchell & Mackie for £1,920. On January 4, 1892, he visited Goudini with Mr. Mitchell, to show him the work and see thoroughly what he had to do before sending down his men. He pointed out that the corbel stones to carry the roof were neglected. The building was then half-way up to the windows. The windows, which should have been all the same, were of different sizes. An arrangement was come to on that day that Mitchell & Mackie should do the work, but the contract was not signed until the 10th of March. Mr. De Villiers wrote stating that the contractors had complained that the measurements plaintiff had given him of the window openings were not correct, that the builder had followed the plans exactly, and the committee would not be responsible for any extra cost, as the mistake was not theirs or their builder's. They consulted him with reference to the glass for the building, and he gave them two samples in November, 1891, which he never heard of again till June, when he received a

letter from Mr. De Villiers saying the contractor should supply the glass, which Mr. Mitchell refused to do. Neither glass nor painting was mentioned in Messrs. Mitchell & Mackie's contract. A number of letters were put in with reference to the glazing and painting, and to the woodwork contract.

By the Court: He was only to see after the contract for the woodwork; the committee were to look after the painting, glazing, and other work themselves.

Examination continued: He had frequently applied for the total cost, but had never received the information. The correspondence assumed a recriminating form in September. The committee were always at the works making changes and giving orders, so that the employees did not know who was "running the show." He reported on the work on October 31, pointing out the various defects, but the committee wrote stating that Mr. Whitehead was ready to defend his work, and further that plaintiff as architect was responsible.

By the Court: It was arranged that he should be paid his commission even when he did not give certificates. Had he supplied the plans only the commission would be 2½ per cent.

Examination continued: He pointed out the defects on each occasion he was there.

By Mr. Justice Buchanan: He could not insist on having them rectified. He could only call attention to them.

Examination continued: He had given no final certificates yet. On April 4, 1898, he inspected the building for the last time. [Correspondence with Messrs. Mitchell & Mackie was put in.] On the 10th of April he tendered his resignation, finding it impossible to please the committee. About £40 at the utmost would complete Mitchell & Mackie's work. He had certified for £1,900 on their contract, and for the painter (McLauchlan) £199 7s. [Additional correspondence was then put in with reference to plaintiff's claim for payment, and defendant's claim for damages.]

Cross-examined by Mr. Innes: The work done by the Building Committee was inspected by him, and it was good work. With regard to the contract for wood work he was in the position of an ordinary architect and gave certificates as the work proceeded. Mr. De Villiers never mentioned a sum as to the cost of the church. £2,000 was not mentioned as the limit when he went to inspect the place. Mr. Botha did not ask him to see that there should be no etceteras. He made no estimate in Mr. Botha's presence that it would not exceed £2,025. He never recommended Mr. Higgo to Mr. De Villiers, and did not know him. He was told to draw up the contract for the carpenter's work alone. The glass produced was cathedral glass of a kind. There were many kinds of cathedral glass. The

committee were to do the painting and glazing work themselves; that work was not included in Mitchell & Mackie's contract. On the 14th July, 1893, witness heard that the roof was leaking. The felting produced was similar to that generally used for stopping leaks. Of Mitchell & Mackie's contract for £1,920, only £1,900 had been certified for, the balance was in the hands of the committee. So with regard to MacLauchlan's contract for £106, a certificate for £100 had been given. The wood produced did not come from any part of the ceiling, which could be seen. There was nothing in the specifications compelling the contractors to share materials. The green baine doors were without panels. Could not say if they were to have been made of teak, did not know that they were made of deal. It was not usual to waste material on parts of work which could not be seen. The floors were put down right at first, but were afterwards interfered with. £4 or £5 would finish the remainder of the painting work.

The witness was then cross-examined at length on Mr. Ransome's report on the building.

Re-examined: Mr. MacLauchlan had done very good work for witness, and was considered one of the best painters in town.

Mr. R. A. Mitchell, of the firm of Mitchell & Mackie, builders and contractors, deposed that on 18th November, 1891, his firm sent in a tender for the woodwork, which was accepted. No reference was made to glass. He got his specification from the plaintiff. Painting and glazing were not part of their work, and were not included in their tender of £1,920. Witness went to Goudini and was introduced to members of the Building Committee by plaintiff. Measured the window openings, and found on his return home that they did not correspond with plans and specifications, reported matter to plaintiff and committee. All the woodwork was made in firm's workshops in town. The window-frames were considerably damaged in transit, and he found that the large window-frame had been allowed to remain exposed to the weather on the open veld. The roof principals had to be brought down to the floor to relieve the walls of the weight. Was of opinion that remainder of work could be done for £80.

Cross-examined: Regarded plaintiff as the architect of the whole work. The floors were raised 14 or 16 inches from the ground. Foreman was in charge, and acted for witness when he was away. Heard that roof was leaking, and after consultation with another builder, the felt was supplied. It was the ordinary felt used in such cases.

James Mackay Robertson, foreman carpenter, in the employment of Mitchell & Mackie, deposed that he was on the spot during the whole of the firm's work at the Goudini Church. The work commenced in April, 1892, beginning with the roof.

He made one of the valleys of galvanised iron. Mr. Mitchell told him to take it away, and when he had partially done so, the committee asked him to put it back, and he did so. The porch gablet was built higher than the elevation plan. He pointed this out to the builder, Mr. Whitehead, who said he was right in his heights by the section plan. One of them was taken down after. Some members of the committee told him to put on the porch roof without waiting for the gablets. The absence of corbels gave them much trouble with the roof. The ridging was properly put on the roof, and felt put in afterwards. It was exactly similar to the Y.M.C.A. building at Worcester. The boards of the floor were properly laid; the boards might have got rain coming from the station. He spoke to some of the committee with reference to the exposure of timber and woodwork to the weather. As far as he could do so, consistently with the way in which the church was built, he followed the plans and specifications. The windows were not of the same size, and were not exactly opposite each other. The tower was not built square. He had to adapt his work to the building.

Cross-examined by Mr. Innes: They took the flooring inside from the veld when it arrived; the ceiling they had no shelter for. He had no specifications, but could see Mr. De Villiers when he desired. The scantlings, so far as he knew, were according to specification. The elevation and section did not agree. The planks on the floor opened because they had got wet at the station and coming over. He had asked the committee several times to send over for them. The planks were damp when put in, and the roof leaked afterwards. He told the committee that the iron valley would be better than the lead valley. He could not say if they asked him to take it away when it commenced to rain. The roof of the Y.M.C.A. Hall at Worcester was not stuffed with felt. It was less exposed than the church at Goudini, and did not require felt. The doors were of deal; he did not know at the time that the specification provided for teak.

By Mr. Justice Upington: The leaking under the ridging was caused by the severe weather. They did not know till the rain came in that anything was wrong. He was obliged to put down the wet boards because he could not keep men there unless he had them at work. He had been told that the specifications with reference to the ridging had been altered.

Robert McLachlan, painter and glazier, Cape Town, deposed that he accompanied Mr. Alexander to Goudini on August 17, 1892, to see about the painting. The committee told him they had arranged about the glass, and that he would get it at Begley's, where he had to buy it, cut it, and put it in, charging a reasonable price. He sent a

tender for the painting afterwards to Mr. Alexander on August 28. He started work about the end of October, finishing about December 22. He went down there on that day and met a member of the committee, who said they were well pleased with the work. It was done according to his contract. In one or two particulars he did even more. Mr. De Villiers objected to the material and workmanship, but he did not know that gentleman was a judge of either. The pieces of timber (produced) were not bad; they were done according to contract.

Cross-examined by Mr. Innes: He did not agree with Mr. Ransome's report as to the manner in which the painting was done. The oil used was the best, and went down in the original tins.

George Henning deposed that he acted as foreman for Mr. McLachlan at Goudini. Two coats of varnish were put on, and all the committee saw it. There were half a dozen of them there every day, and if the weather was wet about a dozen. They followed the men all about, and were very pleased with the work. The weather was very wet and stormy while they were there. Before the glazing was finished the floors were wet, the rain coming in by the windows, the ventilator, and the tower. No rain could come through the joining of the window-glass except in a storm.

Cross-examined by Mr. Innes: The work was done as well as it could be done. When he was taking down the scaffolding Mr. De Villiers did not complain that the painting was badly done. The committee went all over the place, and up the ladders over the gallery. They did not go up to the roof.

By Mr. Justice Upington: This work was as well done as any other first-class work he had carried out as foreman for Mr. McLachlan.

For the defence,

Rev. Isaac F. A. de Villiers, defendant, in his capacity as Dutch Reformed minister at Goudini, deposed that a member of the committee undertook to pay for the foundation, and the rest of the congregation to complete the building. He had an interview with Mr. Alexander, in which he told the architect that the cost of the church should not exceed £1,800 or £2,000. Mr. Alexander distinctly understood. The terms mentioned were as stated by Mr. Alexander. He drew the plans during the sitting of the Synod, when witness was in town. He again said the cost would not exceed £2,000. The committee employed Higgs to lay the foundation for £100, which Mr. Alexander said was not too much. They had an offer from a coloured man at Worcester to do the work for £80, but Mr. Alexander advised them to take Higgs. The committee went on employing Mr. Whitehead for the mason work. The plaintiff gave no certificate to Higgs or Whitehead. He saw plaintiff about the glass, and took

samples to lay before the committee. They discussed the cost again, and plaintiff made some calculations showing the total of the building would be slightly over £2,000. He deposed to the correspondence, advertising, and acceptance of tenders. When Mitchell & Mackie were working he complained of the valleys in the ridging, and it was decided to have them all of lead. He was not present when the foreman was told to leave one of the valleys of galvanised iron. He called Mr. Alexander's attention in June, 1892, to the ridging and the valley. He said zinc was just as good as lead. He afterwards said he would order lead to be put in, but he defended the ridging. He understood that the glass was included in the contract, until he had a letter from Mr. Alexander, with whom he had an interview afterwards. Mr. Mitchell was present, and defendant said he led the committee to believe that glass was included. Mr. Alexander seemed to evade the question. When he saw plaintiff and McLachlan in August, witness said that Mitchell & Mackie were bound to do the painting, and plaintiff said that they should give the glass. The witness then gave particulars of the defects in building and painting pointed out to Mr. Alexander by him. Perkins was employed to do what Mitchell & Mackie left undone. The cost was £3,884 1s. 11d. on which he considered Mr. Alexander should get commission. To that there should be added £100 paid to Mr. Alexander, and £187 paid to Perkins for correcting bad work. The congregation had great difficulty in raising the money. They had to use their Sustentation Fund and were in debt £1,080. If they had known the cost would have been so much they would never have built a church like that.

Cross examined by Mr. Searle: He did not in any of the letters refer to the cost of the church as £2,000, but when Mitchell & Mackie's tender was read it became clear that it would cost over £3,000. He made no complaint to Mr. Alexander that he did not visit more frequently. He saw the tender and schedule of Mitchell & Mackie, and he fully understood that glass was included except for the porch windows. Mr. Mitchell wrote in July that glass was not included, but when he came down in August he said Mitchell & Mackie would supply it. When he got McLachlan's tender he wrote to plaintiff that they could receive no tender for work that Mitchell & Mackie ought to do.

Messrs. Botha, Du Toit, Perkins, and P. M. McLachlan gave corroborative evidence, and Mr. Ramsay deposed to the condition in which he found the building when he inspected it.

Mr. Searle was heard for the plaintiff, and Mr. Rose-Innes, Q.C., for the defendant.

Mr. Justice Buchanan, in giving judgment, said he plaintiff in this case sued upon a contract

which he alleged had been entered into with the defendant to act as architect for the building of a new church at Goudini. They had already intimated that this contract was put an end to by the plaintiff without justifiable cause, and that it was not the conduct of the defendants which compelled the plaintiff to put an end to it. The question then arose was the plaintiff entitled to a *quantum meruit* or reward for the services he had rendered. It was not seriously disputed that he was entitled to something, though it might be argued that he was not entitled to anything until he had completed that work. The whole argument, however, was that he was entitled to a *quantum meruit*, and that was the view taken by counsel. This *quantum meruit* question was a jury question, and looking at all the circumstances of the case, looking at the loose way in which the business had been undertaken, at the work that was done by the defendants themselves, and at the way the work was carried out, they consider the plaintiff would be well paid by receiving 5 per cent. upon the amount expended on the work he had actually supervised, which would amount to £105. If there were nothing else in the case he should say that the defendants had got rid of their obligation by paying this sum of £105. In addition, however, there was a sum agreed to for visits to the work, amounting to £40 19s, which added to £105 would be £145 19s., the sum to which the plaintiff was entitled. Then the defendants said the plaintiff should not be paid because he had been guilty of want of skill and negligence, and they claimed damages in reconviction for £500. Particulars of the alleged negligence were set forth in the various clauses of the plea. It was claimed that the plaintiff had wrongfully stated that the work could be carried out for £2,000. It appeared that the plans were prepared in 1890, not much progress was made with the church the next year, and tenders for the wood-work were only called for in 1891. One of the witnesses stated that the demand for carpenters' work had increased so much in Cape Town that the work could not have been done at the same price in 1891 as in 1890. No guarantee had been given by the plaintiff that the work could be done for the sum mentioned. One's own experience was that architects very rarely had their work carried out for the estimates which they gave. Unless some guarantee had been given, that was not sufficient to prove negligence on which to ground a claim for damages. It could not be said that the defendants were injured or suffered damage by the fact that £3,000 was expended on the church, for it might be well worth the money expended upon it, and nothing had been shown to prove that they had not got the worth of their money. The second count of the plea was withdrawn. The third referred to the contract made

with Messrs. Mitchell & Mackie. The allegation was that the plaintiff had shown neglect in not including the painters' and glaziers' work in that contract. Messrs. Mitchell & Mackie tendered at £1,920 on the supposition that the painters' and glaziers' work was omitted. If they had been included *non constat* the tender would have been greater. He quite concurred with what Mr. Innes had said that every professional man was bound to display reasonable skill, and if he did not display that reasonable skill and loss resulted thereupon, he was liable in damages. But the defendants failed to show that even if the plaintiff had not carried out their instructions by including glass and painting in the woodwork contract that any damage resulted to them because they were omitted. If they had been included, the contract might have been higher. The next particular was that the plaintiff wrongfully certified that certain portions of the work were properly finished, whereas they had not been so done. This part of the case gave him some difficulty, and he thought that there was a great deal of force in the contention that these certificates were improperly given. The plaintiff was in a huff at the time, and resigned; but he had a duty to perform, both to the contractors and to his employers, and it would have to be shown that these certificates were improperly given under such circumstances as would amount almost to fraud before the defendants would be entitled to recover damages. Although they were given in a huff, they were evidently given under the belief that the contractors were entitled to receive them, and he did not think it could be said that they were wrongfully given. The evidence was conclusive that no final certificate was given for anything but for the painting and glazing, the work for which no contract was given. Mr. Ransome said the amount paid to McLachlan was a reasonable charge. It was said that if the glass used were as specified it would cost £160, and the defendants would have to pay Mr. McLachlan more because he was working under no specified contract, but to be paid a fair and reasonable sum for his work. He should like to have it understood clearly that they did not consider the defendants were precluded from testing the question of the liability of the contractors for the work undone. It was clear that the certificates were not final, and it was admitted by both sides that some of the work remained to be done. With reference to McLachlan's work, it was true Mr. Ransome said it could not now be done unless the scaffolding were replaced. At the time the certificate was given Mr. Alexander only said he was giving £100 for work already done. There were many things in the case of which the Court did not altogether approve; the

loose way in which the contract was carried out, the huff which Mr. Alexander displayed, and the manner in which he gave the certificates immediately before he resigned. On the whole, however, the Court was of opinion that judgment should be given for the plaintiff for £145 19s., less £100 paid on account, with costs.

Mr. Justice Upington concurred.

[Plaintiff's Attorneys, Messrs. J. & H. Reid & Nephew; Defendant's Attorney, C. C. de Villiers.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN and Mr. Justice UPINGTON, K.C. M.G.]

REGINA V. HENDRIK JUDGE. { 1898.
Aug. 21st.

Mr. Justice Upington remarked that this case had come before him as judge of the week from the Resident Magistrate of Victoria West.

The accused was charged with the crime of contravening section 4, Act 28 of 1879, as amended by Act 27 of 1889, in that upon or about the 10th day of August, 1898, and at (or near) Witbank, in the district of Victoria West, the said Hendrik Judge did wrongfully and unlawfully, and without the permission of the owner, wander over and loiter upon the farm Witbank aforesaid, the property of Mr. D. A. Theron, a farmer there residing.

The prisoner was found guilty and sentenced to pay a fine of £3, in default to be imprisoned and kept to hard labour for two months.

Mr. Giddy, for the Crown, admitted that the punishment was in excess of that provided by the Act.

The Court reduced the sentence to a fine of £2, or in default one month's imprisonment with hard labour.

In re HOLDWAY V. HOLDWAY.

This was an application made by the plaintiff in the above suit to be allowed to give his evidence on affidavit.

It appeared from the petition that the petitioner had instituted an action for divorce against his wife on the grounds of her adultery.

That he resides at Kroonstad, in the Orange Free State, where he is employed upon railway service. That the evidence to be given by him in the action is entirely evidence as to his marriage. That he has not been able to obtain leave to come

to Cape Town to give such evidence, and that he would lose his situation if he came without leave.

He therefore prayed that he might be allowed to give his evidence by means of affidavit.

Mr. Sheil was heard in support of the application.

Leave was given to put in the affidavit at the trial, the question of its sufficiency as proof of the marriage being left undecided.

SUPREME COURT.

[Before Mr. Justice BUCHANAN and Mr. Justice UPINGTON.]

PRESSNEY V. PRESSNEY.

Divorce—Marriage without community—
Claim in reconvention—Exception.

In an action for divorce on the grounds of adultery the defendant (the wife) admitted the adultery, but claimed in reconvention the payment of certain money advanced by her to the plaintiff, and also certain furniture her property in the plaintiff's possession, The Court overruled an exception to the claim in reconvention that it was not competent in an action for divorce to set up such a claim.

Action for divorce on the grounds of adultery.

The declaration alleged that the parties were married on the 9th May, 1884, by ante-nuptial contract.

That three children were born of the marriage.

That in or about the months of June and July, 1898, the defendant committed adultery with one William Charlton Perkins at Rondebosch and elsewhere.

The prayer was for:

1. A decree of divorce.
2. Custody of the children.
3. General relief and costs of suit.

The defendant filed the following plea:

1. The defendant admits the allegations contained in paragraphs 1, 2 and 3 in the plaintiff's declaration and submits herself to the judgment of this Honourable Court.

And for a claim in reconvention the defendant, now plaintiff, says as follows:

1. She craves leave to refer to paragraph 1 of the declaration and more particularly to the terms of the said ante-nuptial contract therein referred to.

2. Since the existence of the said marriage the

defendant in reconvention has neglected and failed to support and maintain the said plaintiff in reconvention or the children born of the marriage, but on the contrary, the children born of the marriage have been supported and maintained by the said plaintiff in reconvention.

3. At divers times during the continuance of the said marriage the plaintiff in reconvention has advanced to the defendant in reconvention certain sums of money amounting to £470 2s. 1d. as per account annexed, which sums the defendant in reconvention has expended and has failed to account to the said plaintiff in reconvention for the said sums.

4. The plaintiff in reconvention has acquired from time to time, by her own exertions and by gifts from certain of her relations and friends, certain furniture as will more clearly appear from the schedules hereunto annexed marked B and C; the said furniture is in the possession of the defendant in reconvention, and the said defendant in reconvention refuses and declines to deliver the same to the said plaintiff in reconvention.

5. The plaintiff in reconvention further says that the defendant in reconvention is not a fit and proper person to have the custody of the said children the issue of the said marriage.

The plaintiff in reconvention prays:

(a) For payment of the said sum of £470 2s. 1d.

(b) For an order compelling the defendant in reconvention to deliver to her the said furniture referred to in paragraph 4 of this claim (or in the alternative the payment of £300 in lieu thereof).

(c) For an order declaring her entitled to the custody of the said children.

(d) Alternative relief.

(e) Costs of suit.

The plaintiff filed the following exception and plea to the defendant's claim in reconvention:

1. The plaintiff (hereinafter called the defendant in reconvention) excepts to so much of the said claim in reconvention as is contained in paragraphs 3 and 4 thereof, on the ground that it is not competent for the defendant (hereinafter called the plaintiff in reconvention) to claim in reconvention in the present action in respect of the matters in the said 3rd and 4th paragraphs alleged. Wherefore the defendant in reconvention prays that the said 3rd and 4th paragraphs may be expunged with costs.

2. The defendant in reconvention, in case the Court should overrule the said exception, and not otherwise, as to the said 3rd and 4th paragraphs denies that the plaintiff in reconvention advanced to the defendant in reconvention, save the sum of £5 4s. 8d. in Schedule A annexed to the claim in reconvention, which said sum the defendant in reconvention has repaid, sums of money amounting to £470 2s. 1d., or any other sum whatever, and that the plaintiff in reconvention acquired the

furniture in the said 4th paragraph mentioned by her own exertions or by gifts from her relations or friends. The said furniture was in fact purchased out of the moneys of the defendant in reconvention.

8. Alternative y, as to the said 8rd and 4th paragraphs, if any sums of money were paid or any furniture acquired by the plaintiff in reconvention as alleged, the same were respectively gifts made by the plaintiff in reconvention to the defendant in reconvention for the establishment and continuance in business and for the maintenance of the marital home.

4. By way of further alternative to the said 8rd and 4th paragraphs, the defendant in reconvention craves leave to refer to the said antenuptial contract, and says that at divers times during the continuance of the said marriage the defendant in reconvention has advanced to the plaintiff in reconvention sums of money amounting altogether to £890 2s., as per schedule hereunto annexed, which said sums the plaintiff in reconvention has never repaid to the defendant in reconvention. The defendant in reconvention claims to set off against the plaintiff in reconvention so much of the said sum £890 2s. as may be sufficient to meet the claim of the plaintiff in reconvention in the said 8rd and 4th paragraphs set forth.

5. The defendant in reconvention as to the 2nd and 5th paragraphs of the claim in reconvention, denies that he neglected or failed to support and maintain the Plaintiff in Reconvention or the children born of the marriage, or that the said children have been supported and maintained by the Plaintiff in Reconvention, and that he is not a fit and proper person to have the custody of the said children.

Wherefore the defendant in reconvention prays that the said claim in reconvention may be dismissed with costs.

The replication was general and issue was joined on these pleadings.

Mr. Rubie, for the plaintiff, was heard in support of the exception, and relied on *Van Leeuwen, R.D. Law (Kotse)*, Vol. II., p. 462.

Mr. Graham for the defendant.

The Court disallowed the exception.

Evidence of the adultery having been given, and counsel having been heard on the question of the custody of the children, the advances, and the furniture, the Court granted a decree of divorce, the plaintiff to have the custody of the children, with liberty of access to the defendant; the plaintiff to pay the defendant the sum of £50 in full settlement of all claims. No order as to costs.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorneys, Messrs. Fairbridge & Arderne.]

LONDON A'D S.A. EXPLORATION
CO V. DE BEERS CONSOLIDATED } 1898.
MINES (LIM.) AND THE REGIS- } Aug. 22nd.
TRAR, SUPREME COURT.

Practice—329th Rule of Court—Failure to enter appearance.

This was an application on notice calling upon the respondents to show cause why the notice of motion barring the defendants from pleading, answering or excepting, or making claim in reconvention, and the notice setting down the case for trial for the 28th inst. should not be accepted by the Registrar and duly filed, and why the said cause should not be heard on the 28th inst. in accordance with the said notice, and why the respondents should not pay the costs of this application.

The facts are these:

The summons, together with copy of declaration, was served on the defendants on the 8rd inst.

By the summons six days, the period prescribed by the Rules of Court, were allowed the defendants to enter appearance.

The defendants did not within a period of eight days next after the said six days allowed, which period expired on the 17th inst., file their plea, answer, exception, or claim in reconvention to the declaration, and appearance was not entered in the cause until the 18th inst.

On the morning of the 18th inst., before appearance was entered for the defendants, the plaintiffs caused notice demanding plea to be served upon the defendants personally at Kimberley, which notice was served by telegram from plaintiffs' local attorneys before ten a.m. that day.

On this day after a period of twenty-four hours from the making of the demand for plea had elapsed notice of bar was filed with the Registrar, and similar notice also given to Messrs Scanlen & Syfret, who had entered appearance for the defendant company. Notices setting down the case for the 28th inst. were also given to the Registrar and to Messrs Scanlen & Syfret.

The Registrar returned to the plaintiffs' attorneys the notices of bar and trial on the grounds that the defendants had not been allowed the time prescribed by the Rules of Court.

The plaintiffs alleged that they were desirous in accordance with the Rules of Court to have the case heard on the 28th inst., for which day it had been set down.

Mr. Searle was heard in support of the application.

The Court intimated that the power given to a plaintiff under Rule 329 (d) to set down a case for judgment where his claim is for a debt or liquidated demand on the defendants' failure to enter appearance within four days next after the

day prescribed in the summons for entering appearance, applied only to the specific case of a plaintiff's claim being for a debt or liquidated demand.

Mr. Rose-Innes, Q.C., then asked that the bar should be removed and the defendants allowed to plead.

This latter application the Court granted. The case to be heard on the 28th inst, and the costs of the present application to be costs in the cause.

[Applicants' Attorneys, Messrs Fairbridge & Arderne; Respondents' Attorneys, Messrs. Soaule & Syfret.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. PETERSEN. { 1898.
Aug. 28rd.

On the motion of Mr. Giddy, the venue in this case was changed from the Supreme Court to the next Circuit Court to be held at Uitenhage.

LEWIN V. GREEF. { 1898.
Aug. 28rd.

Sale — Written contract — Construction —
Declaration of rights. Action.

This was an action instituted by Salomon and Hester Magdalena Lewin against Stephanus Carel Greef for £500 damages, for a declaration of rights under a certain written contract of sale, and for the discharge of an interdict granted on 2nd May last.

The declaration was in the following terms:

1. The plaintiffs are Salomon Lewin and his wife Hester Magdalena Lewin, married without community of property, residing at Laingsburg, in the division of Prince Albert; the defendant is Stephanus Carel Greef, residing at Worcester.

2. On or about the 4th December, 1891, the plaintiffs and the defendant entered into a written contract, whereby the defendant sold and the plaintiffs purchased all the defendant's right, title and interest in and to the farm "Vischkuil aan de Buffels Rivier," including the village of Laingsburg and the remaining extent of the farm "Vischkuil aan de Buffels Rivier," in extent about 6,806 morgen, situated in the division

of Prince Albert, together with other property for the sum of £8,000 sterling, upon certain terms and conditions set forth in the said contract (a copy of which is hereunto annexed, marked "A"), and which the plaintiffs crave may be considered as inserted herein.

3. The plaintiffs, in terms of the said contract, took possession of the said property.

4. In or about the month of March of the present year and thereafter the defendant wrongfully and unlawfully interfered with the plaintiffs' rightful possession of the said farm, claiming that the plaintiffs were entitled to possession of only a portion of the said farm, measuring in extent about 2,289 morgen, being the portion allotted to the village of Laingsburg; and further, on or about the 2nd May thereafter the defendant wrongfully and unlawfully interdicted in the Supreme Court the plaintiffs from occupying or in any way enjoying the remainder of the said farm, being in extent about 4,012 morgen 392 square rods.

5. By reason of the premises the plaintiffs have suffered damage in the sum of £500 sterling.

6. Wherefore the plaintiffs claim:

(a) £500 sterling as and for damages;

(b) A declaration of the rights of the parties under the contract of sale;

(c) That the rule absolute of the 2nd May, granted by the Honourable the Supreme Court be set aside;

(d) Alternative relief;

(e) Costs of suit.

The defendant in his plea admitted paragraph 1 of the declaration. He denied the allegations in paragraph 2, save that he admitted that he entered into the contract annexed to the declaration, and he said that the price was subsequently fixed by mutual consent at £7,000.

The defendant said that in the year 1872 he was, jointly with one Johannes Jacobus Meiring, the registered proprietor in equal and undivided shares of the farm "Vischkuil aan de Buffels Rivier," and in the same year they partitioned the said farm and sub-divisional transfers of the defined portions were passed, and in the year 1884 the said Meiring sold and transfer redhis said portion to one Kriel.

In the year 1885, the defendant bought from the said Kriel a portion of the land sold as aforesaid and received transfer thereof. Thereafter the defendant laid out a portion of the remainder of the said farm, then belonging to him, as a village farm, called Laingsburg, consisting of certain erven and commonage, as per diagram lodged with the Deeds Registry Office, and sold and transferred certain of these erven of the village farm Laingsburg subject to certain conditions annexed to the transfers thereof. The portion of land bought from the said Kriel, as aforesaid, adjoins the

extent of land laid out as per the diagram aforesaid.

Thereafter the contract of sale annexed to the declaration was entered into by which the plaintiffs bought and the defendant sold the said village farm Laingsburg, which includes the portion aforesaid bought from the said Kriel.

The plaintiffs were at the time of the said sale aware of all the aforesaid facts.

The defendant denied paragraph 3, and said that the land taken possession of by the plaintiffs was the village farm Laingsburg, to wit the said portion above mentioned as per the diagram aforesaid, together with the portion bought from the said Kriel less the erven sold and transferred as aforesaid.

The defendant denied each and every allegation in paragraphs 4 and 5 save that he said that in the year 1898 the plaintiffs wrongfully and unlawfully interfered with the possession of the defendant's lessees of the remaining portion of the said farm Vischkuil, including the aforesaid portions sold as above mentioned, and on the 2nd May, 1898, the Honourable Court granted an interdict restraining the plaintiffs from interfering with or occupying the said remaining extent, with leave to the plaintiffs to bring an action to have the said interdict set aside.

Wherefore the defendant prayed that the plaintiffs' claim might be dismissed with costs.

The replication was general, save that the plaintiffs denied that they only purchased the village farm Laingsburg and that they were aware of the facts alleged in the plea.

Issue was joined on these pleadings.

The material clauses of the contract of sale (referred to in the declaration as Annexure "A"), which was headed *Deed of Agreement concerning the sale and purchase of the village Laingsburg*, were as follows:

I, the first undersigned, Stephanus Carel Greef, Hendrik son, together with my heirs, executors and curators, hereby acknowledge to have lawfully sold to Salomon Lewin my village farm called Laingsburg, better known according to the deed of transfer as Vischkuil aan de Buffels Rivier, with all my rights appertaining thereto, as also and together with (valued at one thousand pounds, £1,000) all mills, machinery, pumps, engines and other movables belonging to this village farm, for the full amount and sum of eight thousand pounds sterling (£8,000) on the following conditions, namely:

This property must be taken possession of on the 1st day of January, 1892, when this purchase shall take effect, and shall be at the risk of the purchaser.

This village farm is sold with all buildings and plantations thereon, as also all privileges of grazing land (including also the erf or erven of Mrs. Krige) and any privileges now belonging to me the said seller, nothing excepted.

Mr. Molteno and Mr. Webb appeared for the plaintiffs, and Mr. Juta and Mr. Searle for the defendant.

Salomon Lewin, the plaintiff, deposed that he first came to Laingsburg about seven or eight years ago. He was first a clerk, and then set up a shop. He entered into the contract of lease for three years (produced) in 1890, with Greeff. In November, 1891, he had an interview with Greeff, as a result of which the latter offered to sell the farm Vischkuil aan de Buffels Rivier, in extent 6,000 morgen, and the whole village of Laingsburg, for £10,000. He afterwards offered to sell it for £9,000, and witness offered £6,500 for the entire property. He finally arranged to purchase it for £8,000. Under the lease he had held only a portion of the village. He told defendant that a proper "koop brief" should be drawn up in Cape Town. Defendant suggested Mr. Wilmot. Witness was satisfied. He drew up the "koop brief." We three met together. Wilmot read out the "koop brief." We had the transfer deed before us. When the Wilmot, whom he met in company with defendant. He had the transfer of the property. When the "koop brief" was read, he asked why the extent of morgen was not mentioned in it, and was told that it was made out according to the diagram. The defendant never showed him the boundaries of the property, although he had asked him, and he had promised to do so. A trader named Du Plessis was present on one of these occasions. When the purchase was made defendant handed him the diagrams of seventeen lots (produced). They did not show the commonage. He could not say how many erven there were in the village of Laingsburg, but there were over 100. The suit for the water is about 200 yards in the disputed ground claimed by defendant. The village, without the right of water, would be of the value of £3,500 at the highest. Around this farm defendant owned other farms. In September, 1892, he received a letter from defendant, which also contained a notice of rates due to the Divisional Council of Prince Albert, which he (witness) paid. He also paid the quitrent.

Cross-examined by Mr. Juta: He was carrying on business in the village of Laingsburg before he bought the farm, and was well acquainted with the neighbourhood. He never saw the beacons of the village commonage. He did not remember Mr. Greeff, the surveyor, surveying the place in 1886. He had not enough cattle to find out how far the commonage extended. He did not know if the beacons of the farm were standing; he knew the direction in which they were. He made no inquiry on the matter from the defendant when he bought. He had previously leased only a portion of the village from defendant. Before he bought he had nothing to do with the land outside the village

commonage. He did not understand the diagram attached to the transfer. Even now he did not know where the corner beacons were. He knew nothing about the deduction in the diagram, although in an affidavit made in May he referred to the deduction. It was not until he was asked for the money that he began to investigate the extent of land which he bought. He always asked defendant to show him the boundaries. In March, 1892, a man, named Marais, was living on the disputed ground. He told him he was living on his ground, and Marais said he hired it from Greeff. He told Marais the rent should be paid to him. In his affidavit made in May he stated that it was only in 1898 he knew of Marais being there. He remembered a shaft being sunk on the farm for certain coal operations; that was before he bought. The man that worked there before worked after the sale, but he did not know it was for the defendant. Witness did not pay. A man named Rollo, who had been at the Diamond-fields, worked there. Witness employed him to sink a shaft on an adjoining farm.

By the Chief Justice: I knew there was a shaft being sunk on my property after I bought it. I did not object because I thought it might be for my benefit.

Cross-examination continued: He did not know that a man named Pfeil burned lime on the land which he claimed. He heard Pfeil had put up some limekilns. There were three streams running through the land he claimed. He saw the limekilns at Buffel's River. He bought lime from Pfeil. He wrote in March, 1898, to Pfeil ordering him to pay 1s. a bag for lime burned, to discontinue the lime-burning in a month, and to pay the rent to him instead of to Greeff. He denied having an interview with Legrange about the grazing, and referring him to defendant for grazing on the disputed land. He also denied other statements, in which it was alleged that he had admitted defendant's right to the ground in dispute.

Re-examined: When he purchased there were no leasees upon the remaining extent. Pfeil did not afterwards burn lime in the old kilns, but about three miles away.

By the Chief Justice: The value of the ground in dispute is £600 or £700. I bought the whole farm for £8,000, but defendant is willing to reduce it to £7,000.

Mr. Molteno said it had been agreed, in consequence of what fell from the Court when the interdict was granted, that no questions should be asked as to why the purchase money had been reduced.

The Chief Justice said the Court had stated then that if an assault had been committed on this man's wife it should be dealt with by action. Had any action been brought for assault?

Plaintiff replied that there had not. He explained that the value of the remainder extent, with all its water and other rights, would be £2,000 or £3,000. The £700 he mentioned was only the grazing value. He paid defendant £500 after the judgment of the Court. He did not pay him £1,000, but he received a receipt for that sum, which he took as a receipt for everything, as it was so stated on the document. Defendant had not explained to him that the portion marked on the diagram had been cut off, and that some of the water of Buffel's River had been reserved for the village. Since he had purchased, all he had done to assert his ownership to the remaining extent was to send his horses there; he had no other stock. The affidavit stating that he only knew of Marais' presence in 1898 was incorrect.

Frederick W. B. Wilmot, agent and special J.P. (Laingsburg), deposed that he drew the contract of sale for the parties. He had not the grant with the deduction before him. He had the partition transfer. Lewin remarked that the extent was not in the "koop brief" and Greeff said it was according to the transfer and nothing was excepted. He paid the road rates and quitrent for plaintiff.

Cross-examined by Mr. Juta: He was agent for Lewin in some previous actions. He was also local agent in the Esterhuyzen case against Greeff. He was a Census officer, but he did not notice that the map from the Colonial Office sent him showed the boundary of the farm.

Peter Daniel du Plessis deposed that he was present when plaintiff asked defendant to show him the beacons. Plaintiff had offered him a house along the river and pasturage.

Frederick George Odendal deposed that he had seen plaintiff's ostriches running on the property a good way up from the commonage. The new limekilns of Pfeil's were a couple of miles distant from the old ones. There were no beacons to be seen so far as he was aware.

Cross-examined: He did not know where the remaining extent began and where the commonage ended.

For the defence,

S. Greeff, land surveyor, deposed that he surveyed the farm Visch Kuil in 1885 and 1886, and laid out the village. Beacons were put up for the village farm, and the original beacons of the old farm were there. He made a deduction on the diagram of the farm, and a separate diagram of the deduction. He framed separate diagrams of the lots.

Cross-examined: The beacons which divided the village from the rest of the farm were on the Buffels River. He was sent by his father to make a line beacon; see if the engine working the cylinder for plaintiff was in the

Laingsburg ground. He found it was eighty yards within the boundary. His father had a large block of farms, but the beacons of each were standing. They were on the tops of hills and mountains. His father sold according to diagram.

Re-examined: The plan produced was the one he had lodged with the Deeds Office. There were about sixty water erven.

By the Chief Justice: There were five or six buildings in the portion sold to Lewin in 1891. He could not say the value.

Mr. Frank Moltano, surveyor in the Deeds Office, gave formal evidence as to the plan produced.

Hermann Pfell deposed that plaintiff used to be in his service when he lived at Laingsburg. After the plaintiff purchased the farm from Greeff, witness entered into an arrangement with Greeff to burn lime on the remaining extent, for which he was to pay a fourth share of the profits. He knew the coal shaft, which was worked before plaintiff bought and was worked afterwards. He cut wood along the river, and Lewin knew he was working and had bought lime from him many times. He went to another part of Visch Kuil soon afterwards, as wood and limestone were scarce in the first place. He was not interfered with till March this year, when he got the letter which had been produced. He deposed to a conversation with Mr. Wilmot in the presence of plaintiff in which he said it was a pity Lewin had not the right to cut wood up the river, and Mr. Wilmot agreed, saying that Lewin had been in too great a hurry to buy.

Cross-examined by Mr. Moltano: He was not on good terms with Lewin because he had insulted him.

By the Chief Justice: The houses that were transferred to Lewin would be worth £5,000, the machinery £1,000, and the village land and commonage about £2,000.

Henry James Horne, Laingsburg, deposed that the coal shaft was opened and worked before the sale, and was worked by Mr. Greeff after the sale. He was employed to make a cylinder, and place it in the river near the boundary. He was to make a trench forty yards long by four to aid the summer supply of the water, but plaintiff said he would have to consult Mr. Greeff, as it would partly go on defendant's ground. That was the ground plaintiff now claimed.

Cross-examined by Mr. Moltano: There is a beacon on a kopje quite near this place.

J. H. Legrange deposed to the plaintiff's referring him to defendant for grazing rights over the disputed ground.

Johannes Plessis deposed that he hired grazing rights from Mr. Greeff on the disputed ground since the sale. He drove some of plaintiff's

ostriches off the ground. He was to pay 15s. a month, but had paid nothing up to the present.

January Vyver gave similar evidence.

Gabriel Viljoen deposed that he took away the woodwork of the old engine-house on the disputed ground, by Mr. Greeff's instructions and with the plaintiff's knowledge.

Mr. Willem Marais was called by the Court, and said that he hired a portion of the remainder extent of the farm from Mr. Greeff in March, 1892, for £24 a year. He had an interview subsequently with plaintiff, who said the land belonged to him.

The evidence of the defendant, taken on commission at Worcester, he being unable to attend on account of illness, was read, corroborating the evidence of the witnesses for the defence.

Mr. Moltano was heard for the plaintiff.

The plaintiff was recalled, and in reply to the Court said that when he bought the property there were nine or ten erven built upon. He enumerated the rents he received.

Mr. Juta was heard for the defendant.

The Chief Justice, in delivering judgment, said: It is common cause between the parties that on the 4th December, 1891, the plaintiff bought from the defendant the village farm named Laingsburg, and the question to be determined in this case is what did the parties mean by "my village farm called Laingsburg"? We have looked at the body of the "koop brief," in which there is a further description of this "village farm," and after reciting that the undersigned had lawfully sold, &c., the village farm of Laingsburg it goes on to say, "better known according to the deed of transfer as Vischkuil aan de Buffels Rivier," with all the rights appertaining thereto, as also, altogether valued at £1,000, the machinery, engines, and other movables belonging to this village farm, for the full amount of £8,000. The plaintiff's contention is that the farm includes not only the village itself and its appurtenances and grazing ground, but in addition the remaining extent which still belonged to the defendant. But in this very preamble which I have read, this statement appears, "and other movables belonging to this village farm," but none of them belong in any way to the remaining extent. They all had connection with that portion of the farm deducted from the diagram as being the portion set apart for the village and grazing rights. This statement in the preamble therefore is an indication that the remaining portion was not included. It states: "According to the deed of transfer," but does not state that the farm was sold according to the deed of transfer. That is only referred to as being the document, according to which the village farm is better known as Vischkuil aan de Buffels Rivier. We find the words "village farm" continually used; twice again in this same document it crops up. It is quite clear

to me that if the defendant had intended to sell what the plaintiff said he intended to sell, the simplest course would have been to mention the remaining extent of the farm, and these words would have been used instead of this cumbersome form of language which we find actually used. When we look at the heading of the document, to which one is entitled to refer, we find that "village" is referred to. It is "deed of agreement concerning the sale and purchase of the village Laingsburg." So that upon the document itself the probabilities appear to me to be in favour of the construction relied upon by the defendant. Against this view, however, there is one circumstance which Mr. Molteno was justified in making the most of, and that is the fact that in 1892, when the Divisional Council rates and quitrent fell due, the defendant sent the account which he received to the plaintiff, and the plaintiff paid it. That certainly is a strong circumstance against the defendant, but if we look at all the circumstances his action can be explained. The defendant naturally looked upon the portion he had sold to the plaintiff as being the most valuable and material portion of the farm, and naturally he sent to the plaintiff the accounts he had received, leaving the plaintiff to pay the accounts, and, if need be, charge him with the very small proportion chargeable upon the remaining extent, which was not built upon, and which would be comparatively valueless. I am certain the defendant believed at the time the contract was entered into that he was not selling the whole of the property, because a few months afterwards he let a portion of this property to Marais, and other portions he let out to others. It is not suggested that this was a fraudulent act. If Lewin had immediately on its coming to his knowledge that Marais occupied a portion of the property warned Marais off, or if he had told Greeff that he objected to Marais being on it, it would have been a strong circumstance to show that, whatever Greeff believed, Lewin did not believe that he had bought only a portion. But the fact that he did not turn him off or give notice to Mr. Greeff that he objected to him is a strong circumstance against the plaintiff. The plaintiff's evidence has not been very ingenuous. In the affidavits made at the preliminary stage of this case the plaintiff stated that he was not fully aware of the trespass of Marais until the present year; whereas he states to-day that he knew of it last year. That also goes against him to this extent, that if he knew last year that Marais was trespassing, why did he wait till March, 1898, before making this objection? Then again, with regard to this shaft, it is quite certain that he knew that this was being constructed upon his

property by Greeff, but he raised no objection, and of course, he says now that he let them go on, as if they found coal he would have the benefit of it. The fact that he went on in this way cannot add much to the opinion which the Court would be inclined to entertain of him. We cannot lose sight of another circumstance in this case and that is the circumstance of the £1,000 paid by Greeff. Although the parties have not referred to it, it is impossible for the Court in estimating the probabilities to lose sight of it. The defendant has consented, it is admitted, to this reduction of £1,000, and his consent was given by means of a document, which stated that it was the last instalment of the full amount. The plaintiff having this document, seizes hold of it as a circumstance for claiming that the whole amount was paid off on account of an assault committed on his wife. The Court intimated that if there had been such an assault the proper course would be not to condone or compound the offence, but to bring an action for it. The question was put to Lewin whether such an action was brought, and he replied that it was not. It appears that the plaintiff took advantage of the form in which the document was drawn for the purpose of claiming that the whole £8,000 was paid, and thus makes the Court believe that he would not be incapable with regard to this other document of wishing the Court to believe that it bore a different signification to what the defendant believed. There have been other persons allowed by the defendant to occupy this place, and the fact that the plaintiff never took any proceedings until March this year goes far to show what the contract was. I believe the view put forward by the defendant must be sustained, and judgment therefore will be for the defendant with costs. At the same time, after the admission made on behalf of defendant, I am bound to express the opinion of the Court that the defendant will have to permit registration upon the title and deeds of the remaining extent of the rights of all these water erven in respect of water originating upon the defendant's remaining extent.

Mr. Justice Buchanan: I concur in this judgment. It is well in all these cases of disagreement as to the contract between the parties to consider the documents. On reading the documents in this case, I consider that the onus lay upon the plaintiff of proving that the remaining extent was included in the village farm of Laingsburg. That he has failed to do, and I agree in the decision that judgment should be for the defendants.

Mr. Justice Upington concurred.

The Chief Justice: I do not for one moment say that Mr. Willmot stated what he believed to be untrue, only that he is somewhat mistaken, and that his memory seems to have failed him in some respects. The fact that he had the original grant

in his possession, in which this portion is actually marked out, might have put him on his guard. I have not determined the question as to what belief Mr. Wilnot had, but what belief the plaintiff had in this case.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buisinné; Defendant's Attorney, C. C. de Villiers.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.O.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.O.M.G.]

PROVISIONAL ROLL.

MASTER V. BOTHA'S EXECUTOR. { 1898.
Aug. 24th.

Mr. Giddy applied for an order calling upon the defendant to file an account.
The usual order was granted.

WALKER V. EMMETT.

Mr. Shell moved for judgment under rule 829 for £7 14s. 4d., balance due for professional services rendered.

Judgment as prayed with costs.

SEEDERBERG AND DUNCAN V. WYLIE.

Mr. Barber applied for judgment for £352 6s. 11d., amount due for goods sold and delivered and for costs of suit.

Judgment as prayed.

REHABILITATIONS.

The following rehabilitations were granted on motion from the Bar: Jacob Philippus Petrus Hugo and James Geddes Newlands.

GENERAL MOTIONS.

CHAMBERS V. CHAMBERS.

Mr. Graham moved for a rule nisi requiring respondent to show cause why applicant, her husband, shall not be admitted to sue her *in forma pauperis* in an action for divorce, by reason of her alleged adultery.

The order was granted, the rule to be returnable on the last day of term.

IN THE MATTER OF FERNANDO { 1898.
FERNANDEZ. { Aug. 24th.

Death notice—Application for leave to file—
Rule nisi.

Mr. Molteno moved for authority to the Master of the Supreme Court to file the death notice of the said Fernandez and act on his will, he having left Table Bay for St. Helena Bay on the 10th June last in the schooner Maria Fredricka, which vessel is believed to have foundered with all hands.

Affidavits were read stating that the schooner left Table Bay on 10th June last and should have arrived at St. Helena Bay on June 13, and that she was believed to have been lost in the gale which raged on the night of June 12. A portion of the vessel, the hatch, was found floating between Robben Island and Dassen Island. The vessel was seen off the latter island on the night of the 13th June. Evidence was given in the affidavits identifying the hatch, and declaring that it could not have been separated from the vessel unless she had broken up and foundered.

The Chief Justice said: The probability is great that the vessel has been lost, but there is a possibility, which one did not even like to suggest, that she might have gone somewhere else. The time was very short, and if she had gone to South America for instance there would not have been time to hear from her.

Mr. Molteno, in reply to the Court, said the chief asset was an insurance policy for £300.

The Chief Justice: You may take a rule nisi calling upon all concerned to show cause on the first day of next term why the order should not be granted as prayed, the rule to be published once in the "Cape Times" and the "Cape Argus."

On the return day the rule was made absolute.

[Attorney, Paul de Villiers.]

Ex parte MYBURGH. { 1898.
{ Aug. 24th.

This was the petition of Philippus Albertus Myburgh and Abraham Alberta Myburgh.

The petition set forth that the parents of one Hendrik Myburgh, to wit, Tielman Roux Myburgh and Johanna Jacoba, made a mutual will on 5th March, 1852, and a codicil on the 30th September, 1875. By the codicil there was bequeathed to the said Hendrik Myburgh jointly with his four brothers, subject to a life interest in favour of the said Johanna Jacoba Myburgh, the testators' shares in certain five farms against payment into the joint estate of the testators of the sum of 12s. per morgen for three of the farms, and 10s. per

morgen for the other two farms. Tielman Roux Myburgh died in 1877. His wife, Johanna Jacoba Myburgh, after adiating under the mutual will and codicil, died in 1892.

Hendrik Myburgh was married, without community of property, to the second-named petitioner, there being issue of the marriage a daughter, born on 16th February, 1898.

Hendrik Myburgh died on 8th April, 1898, and by his last will nominated the petitioners executors of his estate and tutors of his minor daughter, and they have received letters of confirmation as such.

The minor is entitled to one-fifth share in the aforesaid property as her father's successor, on payment of £1,427 8s. 6d. into the joint estate of her grandparents.

The petitioners alleged that they had no funds in hand belonging to the minor out of which to pay the £1,427 8s. 6d., but that the minor was entitled to receive out of the estate of her grandparents an amount estimated at £750; that they were averse to raising the required sum on mortgage of the share in the said properties, which are situated in different districts, as they did not see their way to meet the annual interest on the loan; that they had been offered £1,427 8s. 6d. for the minor's share in the said properties, but were of opinion that more could be obtained for it at public auction.

They therefore prayed for authority to sell the minor's share in the properties by public auction for such sum as might be bid for it, exceeding £1,427 8s. 6d., or if no higher bid be obtainable, then to sell it privately for £1,427 8s. 6d.

The matter was referred to the Master, and he reported as follows:

As the tutors have no funds to pay the amount for which a share in the farm has been bequeathed to the minor, or to meet the interest on such amount if raised on mortgage of the property, no other course appears open than that proposed by the petitioners.

The estate of the minor's father, who died in April last, was worth about £280. From this will have to be deducted his liabilities, so that the amount coming to the minor will probably be very small.

The Master explained that in submitting his report he had assumed that the minor had been mentioned in the will.

Mr. Benjamin was heard in support of the application, and cited *Du Plessis v. Smallberger* (8 Searle, 888).

The Court made no order.

The Chief Justice said: The minor is not mentioned in the will, and the position is this: After the death of the survivor Hendrik Myburgh was alive still, and the right to purchase devolved on him. Then he died, and his executors stepped into his shoes. They have to decide whether they

will purchase the property or not, or whether it is for the benefit of the estate to do so. No doubt there is a minor heir, but that does not affect the duty of the executors. If the minor had been specially mentioned as a legatee, then the executors could not have acted without coming to the Court, but that not being the case I do not understand why they make the present application, and I don't see why the Court should be asked to express an opinion. The executors have to decide whether the proposed sale is for the benefit of the estate or not. There will be no order on the present application. Permission will be given to apply again if necessary.

Ex parte HEUGH.

Mr. Barber moved for an order removing the interdict obtained by petitioner's wife on the 5th August, 1892, whereby the executor of the late T. B. C. Bailey was restrained from paying out to petitioner the amount due to his wife out of the said estate, pending an action to be instituted forthwith for divorce and forfeiture, which action has not been proceeded with.

The application was ordered to stand over, in order that notice should be served upon the petitioner's wife.

INCORPORATED LAW SOCIETY V. } 1893.
ASHWELL. } Aug. 24th.

Attorney—Conviction on charge of theft—
Name struck off roll.

Mr. Searle moved that respondent do show cause why he shall not be struck off the roll of attorneys of this Court, or be otherwise dealt with as to the Court may seem fit, on the ground of his conviction on a charge of theft before the Circuit Court held at Fort Beaufort on the 20th March last, for which he was sentenced to twelve months' imprisonment with hard labour.

Counsel pointed out that this respondent was suspended for twelve months in 1888.

The Chief Justice said: This is the respondent's second offence. He was suspended previously for twelve months. There is no other course open but to strike him off entirely from the roll of attorneys. He must also pay the costs of this application.

Ex parte SMITH.—*In re* ROBERTS'S ESTATE. } 1893.
Aug. 24th.

Curator bonis—Appointment—Powers conferred.

This was the petition of Mr. Richard Shaw Smith, of Port Elisabeth, in his capacity as *curator bonis* to the estate of the late Frederick Bertie Worley Roberts, late of Balmoral, in the district of Uitenhage.

It appeared from the petition that Roberts died at Balmoral on the 8th January, 1893.

Prior to his death he executed a will in England, dated 19th June, 1891, and subsequently he executed a codicil by which he appointed Amy M. D'Epperer Schultz executrix of his will, and administratrix of his estate in this colony.

After his death the death notices, inventory, will, and codicil were filed with the Master and with the Resident Magistrate of Uitenhage. The executrix applied for letters of administration, but they were refused until the will, which it is anticipated will be contested, had been proved.

The assets in England amount to £80,000, and those in this country to about £8,000.

The landed property in the Colony was bought by Roberts shortly before his death, but transfer has not yet been passed, nor duty paid, and the fines are accumulating. The petitioner alleged that the Colonial creditors to the amount of £800 were pressing for payment, none of the debts having been discharged, not even the funeral expenses.

That there were valuable movables in the estate, which it was necessary to preserve, also to employ a number of labourers and servants whose wages were in arrear, and that no further credit would be given to the estate.

That serious loss would follow if matters were allowed to remain as they are until November next, when it is expected the will will be proved. That the *Aegis* Company, of Port Elisabeth, was prepared to advance funds if the authority of the Court were obtained.

Further, that one Charles Broad had taken possession of a portion of the Balmoral estate under an alleged lease, which was disputed, and that he was cutting down valuable timber and damaging the property. Under these circumstances, the petitioner prayed for an order empowering him to raise sufficient funds to pay:

1. The transfer duty payable in respect of the purchase price of the property and the conveying charges.

2. Pressing claims against the estate.

3. The maintenance expenses of the estate generally.

4. Road rates and taxes.

And further, for an order for the sale of such perishables, including cattle and machinery, as may be necessary.

And further, to grant petitioner leave to institute an action against the said Broad, and pending such action, to grant an interdict restraining him from cutting or removing wood from the Balmoral estate.

Mr. Searle was heard in support of the application.

The Court granted the powers prayed for, also a rule *nisi* calling upon Broad to show cause on the 12th September why he should not be interdicted.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

Ex parte NEL.

Mr. Tredgold moved for the appointment of petitioner's husband as trustee under their ante-nuptial contract to complete certain transactions in regard to the purchase of landed property from the estate of petitioner's father, as sanctioned by order of the Court on the 12th July, 1890.

The Chief Justice said it might be mentioned to Mr. Barry that the Court had suggested his name, and possibly he might undertake the trusteeship. The matter would stand over.

THE LONDON AND SOUTH AFRICAN } 1898.
EXPLORATION COMPANY V. } Aug. 24th.
DE BEERS MINES.

Mr. Searle moved for an order requiring the respondents to allow the applicants, or the agents of the Alice Syndicate, to have access to certain well or pit and claims on the farm Dorstfontein, in the district of Kimberley, for the purpose of exposing the concealed proofs of diamondiferous soil, and further verifying the discovery of diamondiferous ground in the said claims.

Mr. Innes, Q.C., who with Mr. Solomon, Q.C., appeared for the respondent company, applied that the matter might stand over until Monday in order to reply to affidavits served late on Wednesday evening. Mr. Innes said his learned friend and himself had only received their briefs that morning and they wished to put in affidavits in reply.

Mr. Searle said the only objection he had to that application was that if granted it would be quite impossible for them to go to trial on Wednesday as arranged. This was an order that should be granted irrespective of any affidavits. They asked for an inspection of certain ground which they believed to be diamondiferous, and they were entitled to that under the lease. They had

affidavits to show a strong *prima-facie* case that this ground was diamondiferous. They did proceed to inspect, but were interrupted by the respondents, who ejected them.

Mr. Innes said they were charged with concealing proofs. They could not reply to these allegations until the secretary came down to-morrow morning.

The Chief Justice asked if the plaintiffs would withdraw that part of the affidavits.

Mr. Searle said they stated in the declaration that the respondents filled up a certain well.

The Chief Justice said that if any contentious matter was introduced in the affidavits they must give the respondents an opportunity of replying.

Mr. Searle said he would withdraw those allegations for the purposes of the present motion.

The Court said they could not decide the application now; the motion should stand over till Monday. A special day would be fixed for the hearing of the case.

THE MASTER V. NAUDE'S TRUSTEE.

Mr. Giddy moved for an order requiring the trustee in the said estate to file the liquidation account and plan of distribution required by section 108 of the Insolvent Ordinance, and that he do pay the costs of this application *de bonis propriis*.

The order was granted.

MEYER V. MEYER.

Mr. Tredgold moved to make absolute the rule nisi admitting applicant to sue in *forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

Granted.

In re THE UNION BANK. { 1898. Aug. 24th.

Mr. Innes, Q.C., moved for the sanction of the Court to certain compromises proposed to be effected by the official liquidators with shareholders and debtors. The following is a list of the compromises:

David Thompson, jun., a contributor on thirty shares, proposes to pay the third call of £85 per share in six monthly instalments, commencing May 1, 1898. Three of these instalments have been duly paid, amounting to £625.

William Keene, a contributor on twenty-five shares in the Union and thirty-three shares in the Cape of Good Hope Bank, surrenders all his

securities, the Union share being £660 7s. 8d. A relative new offers £100 for a full release.

John Searlett Duncan, a contributor on three shares, offers £250 for a final discharge, which amount has been deposited.

M. H. le Roos, a debtor to the extent of £1,246 15s. 6d. on bills endorsed by Messrs. Landsberg, Son & Co. (who have already compromised), now reduced to £779 4s. 9d, offers £450 as a compromise in full settlement. The amount offered has been deposited.

The Court sanctioned the compromises.

SOLOMON V. SOLOMON. { 1898. Aug. 24th.

This was an action for divorce brought by the wife by reason of her husband's alleged adultery.

Mr. Graham appeared for the plaintiff; the defendant appeared in person.

Mr. Graham said the plaintiff resided in Kimberley, and he had reason to believe that she had come down to Cape Town, but had not yet reached the Court. He applied to examine the witnesses now, and to take the plaintiff's evidence afterwards.

Margaret Comeyn was examined, and deposed that the defendant had been cohabiting with her in Wynberg for a considerable time.

The defendant having admitted the adultery with this witness, the hearing was postponed for plaintiff's attendance.

VAN VUUREN V. PIENNAAR. { 1898. Aug. 24th.

This was an appeal from a judgment of the Resident Magistrate for Colesberg in an action in which the present appellant sued the respondent for £11 8s., made up of the following items: grain supplied, £1 13s.; potatoes, 10s.; £6 10s., the value of a tarpaulin lent by the plaintiff to the defendant and returned by the latter in a damaged condition, and £2 10s. damages for detention.

The defendant pleaded the general issue. The evidence clearly showed that the corn and potatoes were duly supplied to the defendant, there was great conflict of evidence as to the condition of the tarpaulin when it was returned by the defendant, the latter and his witnesses swore that it was as good as when it was lent, and the plaintiff and his witnesses deposed that it was considerably damaged.

The defendant also deposed to his having sold a pig to the plaintiff, valued at 25s., but there was no claim in reconvention for this amount.

The Magistrate gave judgment for defendant with costs.

The plaintiff now appealed.

Mr. Searle was heard in support of the appeal, and, at the suggestion of the Court, consented to the case being considered as though there had been a claim in reconvention for the 25s.

Counsel having been heard, the Court allowed the appeal.

The Chief Justice said: I should have been glad to have been able to uphold the judgment of the Magistrate in this case, because it is certainly the most petty one that has ever made its appearance in the Supreme Court. Still, it appears that the plaintiff has a grievance. The Magistrate admitted that he was entitled to 80s. in respect of the wheat and to 10s. in respect of the potatoes sold. But because the defendant had a claim in respect of a pig which had been sold to the plaintiff, the Magistrate dismissed the action altogether. The pig sold was at the utmost value only worth 25s., and that deducted from 40s. would still leave 15s. due to the plaintiff. There was no counter-claim made in this case, and, strictly speaking, the Magistrate ought to have awarded 40s. to plaintiff, leaving the defendant to counter-claim or bring another action. But, as Mr. Searle has allowed the case to be considered as if there were a counter-claim, the Court can dispose of the whole matter at once, and enter judgment for the plaintiff for 15s., with costs in this Court and the Court below, save and except such witnesses' expenses as were incurred by reason of plaintiff's claim with respect of the tarpaulin, which must be paid by plaintiff.

Their lordships concurred.

[Appellant's Attorney, G. Montgomery Walker.]

Ex parte NEWLANDS. { 1898.
Aug. 24th.

Insolvency—Act 38 of 1884—Rehabilitation.

The Court granted the rehabilitation of an insolvent the account and plan of distribution in whose estate had not been confirmed owing to the negligence of the trustee, who at the date of the application was alleged to be dead but proof of his death was not before the Court.

Application for the rehabilitation of the insolvent.

The estate was surrendered on the 1st February, 1889. The liabilities amounted as per schedule to £621 18s 4d., and the assets to £73 5s. The debts proved amounted to £405 5s., and the actual deficiency was £364 1s. 1d.

The final account and plan of distribution had not been confirmed, but the trustee's report was very favourable to the insolvent.

It appeared from the affidavits that the insolvent had received a letter from his trustee's wife to the effect that her husband had died in the Johannesburg Hospital on the 11th April, 1890.

That the insolvent endeavoured, but without success, to obtain a certificate of death from the medical officer in charge of the hospital.

That he had searched in the Master's Office for a record of his trustee's death but could find no trace of it.

There was also evidence to show that the account had not been confirmed owing to the negligence of the trustee, to whom the insolvent had rendered all possible assistance.

Mr. Buchanan was heard in support of the application and cited *In re Nannucci* (4 Juta, 171), and *In re Barry* (4 Juta, 899).

The Court granted the rehabilitation.

[Applicant's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.O.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.O.M.G.]

SOLOMON V. SOLOMON. { 1898.
Aug. 25th.

Mr. Graham for the plaintiff; defendant appeared in person.

This was an action for divorce, which was partially heard on Thursday, when the adultery was proved, and the case postponed for the attendance of the wife.

Annie Solomon deposed that she married the defendant at Wynberg. They never lived happily, her husband drank and treated her unkindly. She had left him on account of his cruelty and his improper conduct. She was in service for the past two years at Kimberley.

Defendant said his wife was a "liar." He produced anonymous letters, which he said he received from Kimberley, reflecting upon her character.

Plaintiff denied these statements.

The Chief Justice: The adultery has been clearly proved with the woman who appeared yesterday, and the defendant does not deny it. The decree will be granted with costs.

TRUSTEES SOUTH AFRICAN INTERNATIONAL EXHIBITION V. W. A. RICHARDS AND SONS. { 1893.
Aug. 26th.

Written contract — Construction — Special Case.

This was a special case, stated for the determination of the Court in the following terms :

1. The plaintiffs are the lawfully appointed trustees of the South African and International Exhibition, Kimberley, 1892.

2. The defendants are a firm of printers and publishers, carrying on business in Cape Town.

3. In the month of February, 1892, the parties to this suit entered into a certain agreement in writing, copy whereof is herewith annexed and marked A, to which the parties crave leave to refer this Honourable Court.

4. The parties crave leave more especially to refer to clauses 9, 10, and 11 of the said agreement, which are to the following effect :

Ninth.—The said committee shall be entitled to half-share in the profits resulting from the sale of the said catalogue and the advertisements inserted in the same, after deduction of all fair and reasonable charges and expenses in connection therewith, such as cost of paper, printing, agency, travelling, and so forth. The bill of costs to be taxed, and profits estimated by a chartered accountant to be mutually agreed upon.

Tenth.—With a view to having a ready means of arriving at the greater part of the charges and expenses referred to in the preceding paragraph, No. 9, it is agreed :

(a) That in calculating the cost of the said catalogue the cost shall be £1 4s. per page for 10,000 copies, £1 12s. per page for 15,000 copies, and £2 per page for 20,000.

(b) The sales of the catalogue shall be accounted for at the rate of 1s. per copy, less a bookseller's commission of 15 per cent.

(c) Advertisements shall be charged for as follows : Full page, £5 5s., half page, £3 3s., in general advertisements ; quarter page, £2 2s., in catalogue matter.

Eleventh.—The said firm agree to be responsible for all the advertisements at scale rates as above mentioned, subject to a deduction in their favour of 33½ per cent. for commission and collection.

5. The parties are not agreed as to the true intent and meaning of the said clauses, but have agreed to submit their contents for decision to this Honourable Court, it being necessary to determine the true construction of the said clauses before the bill of costs can be taxed and the profits estimated and other matters in dispute settled by a chartered accountant, in accordance with clause 9.

6. The defendants have in certain cases charged advertisers for advertisements at rates exceeding the rates set forth in paragraph (c) of clause 10, and have received from such advertisers payment for such advertisements accordingly ; and in other cases they have accepted advertisements at rates less than the aforesaid scale rates, in order to secure the said advertisements, and have received payment for such advertisements accordingly. And the defendants have in many instances been unable, after the exercise of all due diligence, to receive payment from advertisers of the amounts payable by them in respect of their advertisements.

The plaintiffs contend that, according to the true intent and meaning of the said agreement, and the clauses more particularly referred to, and in order to estimate more correctly the profits resulting from advertisements in the Exhibition catalogue, the defendants were not entitled for their own profit to charge higher rates for advertisements than those set forth in paragraph (c) of clause 10, and are responsible and accountable :

1. Under clause 11, for all advertisements in the said catalogue at the rates which advertisers were to be charged under paragraph (c) of clause 10 ; and

2. For all additional moneys received by the defendants in respect of advertisements actually charged for and paid for at rates exceeding the rates set forth in the said paragraph (c) of clause 10 ;

Subject in each case to a deduction of 33½ per cent. in favour of the defendants, for commission and collection.

The defendants contend :

That they are liable to account to the plaintiffs for one-half share of the money chargeable for all advertisements inserted in said catalogue upon the scale set forth in section 10, paragraph (c) of the said agreement, whether such moneys were actually received by them or not, but deducting such fair and reasonable expenses as are mentioned in section 9 of the said agreement, and also deducting 33½ per cent. for commission and collection, but that they are not liable to account to the plaintiffs for any moneys received by them for any advertisements in excess of the said scale of rates ; or alternatively, the defendants contend that if they are liable to account to the plaintiffs for moneys received by them for advertisements in excess of the said scale of rates, then they are only liable to account to the plaintiffs for one-half share of the profits actually derived from advertisements at whatever scale charged, after deduction of the expenses and commission hereinbefore referred to.

Wherefore the parties pray for the judgment of this honourable Court on their respective contentions.

The Attorney-General, Mr. Schreiner, Q.C., for the plaintiffs.

Mr. Rose-Innes, Q.C., for the defendants.

Judgment was given for the defendants.

The Chief Justice in giving judgment said: In order to ascertain the true meaning of the disputed clauses of this contract the Court must look at the contract as a whole. Now from the first clause it would appear that there was an out-and-out sale by the committee of the Exhibition to Messrs. Richards & Sons of the sole and inclusive right of printing, publishing, and selling the official catalogue of the Kimberley Exhibition. The consideration to be paid for this right was, firstly, a bonus of £100, and secondly, under the 9th clause there should be a payment made by the firm of a half-share of the profits. By that I understand not a half-share in the gross profits, but in the net profits. But in order to give a clear and definite basis upon which these profits should be calculated, the parties proceeded in the 10th and 11th clauses to point out to the chartered accountant how he should make his estimate. The dispute now arises with regard to sub-section (c) of clause 10. "Advertisements should be charged for as follows: Full-page, £5 5s.; half-page, £3 8s.; quarter-page, £2 2s." Mr. Schreiner contends that the expression "charged for" shows that it was intended that only those amounts should be charged, and that if anything above those amounts were charged for advertisements the firm are to account for the difference. But if I am right that the 9th clause means net profits, I think he ought to have gone further, and if in any case the committee found that the firm had fairly charged less than the sale when it was necessary to charge less, in that case allowance should be made in respect of the less sum so charged. No doubt something could be said in favour of the view of the plaintiff from the fact that "charged for" is mentioned in sub-section (c) and "accounted for" in sub-section (b); but looking at the general scope of the contract, the Court ought not to lay that stress upon the difference of the words which they otherwise might lay. The utmost that can be said is that if there had been an extra charge made it would have given the committee a case for an action for damages if in consequence of the excessive charges there had been fewer advertisements. But that question does not arise, and I am of opinion that the firm should only be bound to account for such sums as they were entitled to charge in respect of the advertisements. That is practically the contention which the defendants set up, and which I think ought to be sustained. I will not adopt that contention in the exact words in which the defendants have submitted it to the Court. I shall put it in this way: In the opinion of the Court defendants are responsible and accountable under clause 11 for

all advertisements in the catalogue at the rates at which advertisements were to be charged in paragraph (c) of clause 10, subject to a deduction of 83½ per cent. in favour of the defendants for commission and collection.

Their lordships concurred.

Mr. Innes applied for costs, which were granted [Plaintiff's Attorneys, Messrs Scanlen & Syfret; Defendant's Attorneys, Messrs Fairbridge & Arderne.]

SWANEPOEL V. BIRK.

{ 1898.
Aug. 25th

Trespass—Damages—Interdict.

This was an action for trespass instituted by Daniel Johannes Jacobus Swanepoel, of Wolvefontein, in the division of Prince Albert, against Johannes Lodewyk Birk, of Paardefontein, in the division of Worcester.

The declaration alleged that the act of trespass complained of took place on the 8th and 9th November, 1892,

That the plaintiff had sustained damages in the sum of £86 6s. in consequence of the said trespass.

The plaintiff prayed for:

(a) A perpetual interdict restraining the defendant from trespassing upon his farm Wolvefontein.

(b) Judgment for £86 6s. as and for damages.

(c) Further relief, with costs of suit.

Mr. Graham appeared for the plaintiff; the defendant was in default.

Mr. D. J. J. Swanepoel, the plaintiff, deposed that he resided at Wolvefontein, in the district of Prince Albert. He bought the farm in 1874. At that time there was a road leading from his homestead to the farm Hartebeestfontein, which was diverted by the Divisional Council in 1885, and there was a proclamation to that effect in the "Gazette." The difference in distance by the old and new roads was eight minutes, but the new road was much better. He had a large camp upon his farm. The defendant, who resided four miles away, knew that the proclamation was issued. Birk raised no objection to the making of this camp, which was a large one, between 6,000 and 7,000 morgen. He had improved the property, and erected dams. In May, 1892, Birk came upon the plaintiff's farm with a wagon, and drove through the camp and outspanned there. Plaintiff spoke to him afterwards, and he said it was a public road. Plaintiff warned him against repeating the trespass, and told him the farm had been closed as a public road. In November, he came again with a number of cattle, and persisted in outspanning on plaintiff's property, and fouled the waters in his dams,

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

grazed over 300 sheep on the land, and through the camp in all directions. His dogs chased away one of plaintiff's female ostriches, valued £25. He had trespassed several times since. A reasonable estimate of his damage was £40.

Corroborative evidence of the trespass having been given,

Mr. F. W. B. Willmot, agent, and Special Justice of the Peace at Laingsburg, deposed that he inspected the damage, which he estimated at £36 6s. He wrote to defendant, at plaintiff's request, warning him not to continue the trespass, and demanding compensation.

The Chief Justice said the damages claimed were not excessive as it was a deliberate trespass. Judgment would be given as prayed with costs. Plaintiff to have his expenses as a witness.

[Plaintiff's Attorney, C. C. Silberbauer.]

In re BLAKE V. LOUW. { 1893.
Aug. 25th.

Mr. Searle moved for an order placing Messrs. Lindley and Wood on the record in the case as plaintiffs or co-plaintiffs, on the ground that Blake had ceded and assigned all his right and interest in the promissory note sued on to them, and was being put up and used as a nominal plaintiff in the matter.

Mr. Graham opposed the application.

On the 1st August last the matter was before the Court in the form of a claim for provisional sentence.

The defendant denied his signature to the note, or that he had authorised his wife to sign it for him.

The case was ordered to stand over for the production of evidence.

The case made by the defendant to-day was that Blake was a man of straw, and that Lindley and Wood were the interested parties, and should be made plaintiffs.

Lindley and Wood's case was that Blake had a sufficient interest in the matter to appear as plaintiff, inasmuch as he was indebted to them, and under a contract existing between themselves and Blake, the latter was personally liable for any loss which might accrue in consequence of his accepting in payment of premiums promissory notes which were not met on maturity. After a long discussion as to whether a person could be compelled to be joined as a plaintiff, the Court by consent of counsel for both parties, ordered Messrs Lindley and Wood to be joined as co-plaintiffs in the action.

ADMISSION.—*Ex parte* DE VILLIERS. { 1893.
Aug. 23th.

Mr. Rose-Innes, Q.C., moved for the admission of Mr. Jacob Abraham Jeremy de Villiers, barrister at law, as an advocate of the Supreme Court.

Mr. De Villiers took the oath of allegiance, and was duly admitted.

LONDON AND SOUTH AFRICAN
EXPLORATION COMPANY V. DE
BEERS MINES. { 1893.
Aug. 23th.

Mines and minerals—Diamondiferous ground
—Inspection—*Prima facie* evidence of the
existence of diamonds.

Where the applicants had leased certain ground to the respondents and under the lease they were entitled to a surrender on the discovery of diamonds in the ground leased the Court on being satisfied that there was prima facie evidence of the existence of diamonds in the land in question ordered an inspection of the ground for the purposes of a pending action.

This was an application on notice calling upon the respondent company to show cause why an order should not be granted permitting the applicants, or the Alice Syndicate, to have access to a certain well or pit and claims mentioned in the affidavits for the purpose of exposing the concealed proofs of the existence of diamondiferous ground, and of further verifying the discovery of diamondiferous ground in the said claims. The facts are as follows:

The applicants are the registered owners of the farm Dorstfontein, in Griqualand West, upon which are situated the Du Toit's Pan Mine and certain depositing-floors used in connection therewith.

Certain claims in the said mine are let by the applicants to the respondents, and a certain area of ground upon the said farm has been allotted by the applicants to the respondents for use as depositing-floors in connection with the claims so

leased as aforesaid, upon the terms and conditions contained in certain articles of agreement.

The applicants alleged that portion of the area allotted as depositing-floors, in extent about 4,500 square feet, or five claims of 80 square feet each, had been discovered to be diamondiferous.

That they (the applicants) were entitled under section, 3 sub-section 2, of the articles of agreement to a surrender to them by the respondents of the latter's interest in the said portion of diamondiferous ground, and had called upon the respondents to surrender their interests as aforesaid.

That the applicants were willing upon such surrender to grant the respondents an area of land for depositing ground equal to that surrendered in addition to compensation.

That the applicants had let to the Alice Syndicate certain diamondiferous ground situated on the depositing-floors above referred to, and were bound to put the syndicate into possession and occupation of the said ground, and to assure them peaceable and quiet occupation.

That the applicants had placed the syndicate in possession of the said five claims, but the respondent company forcibly ejected the servants of the syndicate, arrested Mr. A. Forrest Brown, one of the trustees of the syndicate, and brought him in custody before the Resident Magistrate of Beaconsfield, by whom he was sentenced to pay a fine of £2, or in default to fourteen days' imprisonment for contravening section 7 (12) of the Police Offences Act, 1882.

That at the same time the respondent company filled up a well or pit in the said five claims in which the diamondiferous ground had been discovered, and had enclosed an area approximating to the said claim by barbed wire.

That the respondent company had carried on no mining operations in the said mine or depositing-floors for a period of two years and upwards, and that the pit or well had not been filled up nor the said area fenced off in the course of any mining operations, but for the purpose of preventing the applicants or the Alice Syndicate from having access to the ground, and for the purpose of concealing evidence required to settle the dispute between the parties, and also for the purpose of postponing the hearing of the case.

That the applicants had received a large sum of money from the syndicate, and are exposed to a heavy claim for damages if they did not forthwith place the syndicate in peaceable occupation of the said claims.

The evidence of the ground being diamondiferous was afforded by Mr. J. M. Taylor, who deposed that in 1874 he was sinking a well at a spot in the Du Toit's Pan depositing-sites, and found in the well diamondiferous ground from which he took a diamond.

Mr. A. F. Brown also alleged that he had taken ground from the well referred to by Taylor, and that it was diamondiferous.

The respondents, in their answering affidavits, alleged *inter alia* that no ground had been pointed out as depositing-floors in place of that claimed. That it was impossible to locate the situation of the area claimed by the applicants. That there was no proof that the ground was diamondiferous, and that the well had been filled up and the ground fenced in, not with the object alleged by the applicants, but for the purpose of replacing the ground which had been disturbed and to prevent a fresh trespass.

Mr. Searle was heard in support of the application, and contended that an inspection of the ground should be allowed, as there was evidence both from personal observation and experience that the ground was diamondiferous. He referred to *Bainbridge on Mines and Minerals* (pp. 815—817), and cited the following authorities: *Lonsdale (Earl) v. Curwen, East India Company v. Kynaston, Browns and Others v. Moore and others* (8 Bligh, 168, 168, 178), and *Bennitt v. Whitehouse* (28 Beav., 119).

Mr. Rose-Innes, Q.C. (with him Mr. Solomon, Q.C.), for the respondent company, urged that the present application was a novel one. In England inspection of mines or other workings was ordered under the powers conferred upon the Courts by the Judicature Acts. The cases cited for the applicants had reference only to questions of tort, which did not arise in the present matter. Under section 3, sub-section 2, of the articles of agreement between the two companies, the discovery of diamondiferous soil was a condition precedent to the right of entry. He referred to Act 19 of 1883, section 69, as to the machinery provided to enforce rights of discovery. He cited *London and South African Exploration Company v. Bultfontein Mining Company* (8 Juta, 55). The area claimed by the applicants was alleged to be only 4,500 square feet, whereas it actually comprised 75,000 square feet. The application was a fishing one, and should be refused.

Mr. Searle, in reply: We do not ask for a strict interpretation of section 2 of the articles of agreement. We have shown the Court that there is some evidence that the soil is diamondiferous. The application is not fishing; on the contrary, it is most reasonable. We have followed the English precedents in similar cases. Section 69 of Act 19 of 1883 has no application, and refers to adjoining claimholders. It is to the interest of both parties that an inspection should be made before the case comes on for trial.

The Court granted the application.

The Chief Justice said: I quite agree with the defendants' counsel that the plaintiffs have to

right to go about examining the ground which has been let to the respondent company. But if the plaintiffs have reasonable grounds for believing that any portion of this land is diamondiferous, and can satisfy the Court that there is *prima facie* evidence for that belief, I think the Court ought to assist the plaintiffs to obtain further proof of that fact. Even if there were no precedents to justify such a course, the Court would be prepared in the interests of the administration of justice to exercise a power of this kind. The only question, therefore, in this case is whether the plaintiffs have produced *prima facie* evidence to justify the Court in granting this order. Well, there are statements by the witnesses, who say that both before 1874 and after the execution of the lease they examined the ground and found it to be diamondiferous, and the plaintiffs have shown their faith in the diamondiferous nature of the ground by letting a portion of it to a syndicate, and the syndicate have shown their faith in it by paying to the plaintiff company a large sum of money for the right of mining upon this place. In my opinion, therefore, there is *prima facie* evidence sufficient to justify the Court in granting this order; at the same time, I would suggest to the parties that they ought to endeavour to agree upon some impartial persons to inspect the ground. The plaintiffs if left to themselves, would probably employ partisans to go upon the ground, who would probably give such evidence as the Court has often to entirely set aside. If the parties can agree upon a thoroughly impartial man to inspect the ground, more especially in the neighbourhood where the diamonds are said to be, it would be the most satisfactory course to adopt.

Mr. Innes said he was instructed to say the defendants would accept the inspection of Captain Quintrall, Inspector of Claims.

Mr. Searle said he could not accept this proposal without consultation with his clients. He suggested that it be left to the parties themselves.

The Chief Justice: I am not inclined to leave it to the plaintiffs, who had taken the law into their own hands. I should certainly like to see the inspection made by an impartial man.

Mr. Searle said it would be better to have more than one man.

The Chief Justice: How would it be to appoint Captain Quintrall, to be accompanied by one person for the plaintiffs and one for the defendants.

This suggestion having been adopted, the Chief Justice said: The Court will appoint Captain Quintrall to inspect the land mentioned in the declaration for the purpose of ascertaining whether it is diamondiferous or not, according to the terms of sub-section 2 of section 8 of the articles of agreement of the 5th July, 1891, together with one person to be appointed by the

plaintiffs and another by the defendants; the costs of this application to be costs in the cause.

[Applicant's Attorneys, Messrs Fairbridge & Arderne; Respondent's Attorneys, Messrs Scanlen and Syfret.]

ABURROW V. WALLIS.

1898.

{ Aug 28th

Donation—Transfer—Illicit intercourse—
Immoral consideration—*Per delictum*.

The defendant while cohabiting with the plaintiff as his mistress gave and transferred a certain house to her, and afterwards, under her power of attorney, sold the house and received the proceeds.

Held, on appeal against a judgment ordering the defendant to account for such proceeds, that, inasmuch as the land had been transferred to the plaintiff, and the evidence failed to establish the defence that the transfer was not intended to operate as a gift, the defendant could not rely on the immorality of the cohabitation as a ground for treating the proceeds of the sale as his own.

This was an appeal from a judgment of the High Court of Griqualand West in an action in which the present respondent, Mrs. Martha Johanna Wallis (plaintiff in the Court below), sued the appellant, Edward Aburrow, for the sum of £400, being the purchase price of certain property registered in the plaintiff's name, and sold by the defendant.

The declaration alleged that on or about the 4th December, 1891, and at Kimberley, the defendant sold for and on behalf of the plaintiff, and for her account, a certain piece of perpetual quitrent ground, being lot No. 7B, with buildings thereon, situate in De Beers-terrace, Kimberley, and being the property of the plaintiff, for the sum of £400.

That the defendant had received the afore-said purchase price of the property, but refused to pay it to the plaintiff or account to her for it in any way.

The plaintiff claimed:

(a) An account of such purchase price.

(b) Payment of the sum of £400, or such other sum as might be shown by the account to be due to the plaintiff.

(c) General relief, with costs of suit.

The defendant, in his plea, admitted that on or about the 4th December, 1891, he sold a certain piece of perpetual quitrent ground, being lot No. 7B, with the buildings thereon, situated in De Beers-terrace, Kimberley, for the sum of £400

sterling, but said that the said property was his own and did not belong to the plaintiff.

He denied that the said sale was made for and on behalf of the plaintiff or for her account, and alleged that the said sale was made on his own behalf and for his own account.

At the trial the plaintiff's evidence went to show that in 1880 she met the defendant; and subsequently they lived together as man and wife until August, 1892, when he left her. That in 1883 he bought the property in suit in the plaintiff's name and had it transferred to her. That she had accepted the gift and never waived her right to it. That afterwards in December, 1891, the defendant, who held the plaintiff's general power of attorney, which was executed shortly after the purchase of the property together with a will making him her universal heir, sold the property for £400, and had not accounted to her for the purchase price.

The defendant in his evidence alleged that he had bought the property in question on his own account, that he had never made a present of it to the plaintiff, and that his only object in buying it in the plaintiff's name and having it transferred to her was to prevent the lessor of the adjoining property, which he (the defendant) rented, from knowing that he had acquired it.

That he told the plaintiff that he had sold the property, but did not say that the money (the purchase price) was hers, nor did she ask him for it.

Judgment was given for the plaintiff for £400 and costs.

The defendant now appealed.

Mr. Sheil was heard in support of the appeal. He said it was to be regretted that the learned Judges, who decided the case in the Court below, had not given the reasons for their judgment, because from the form of the judgment as it now stood it was impossible to ascertain whether their lordships found that the transaction between the plaintiff and the defendant amounted to a gift *inter vivos* and was duly completed by acceptance, or whether it was merely part performance of a contract for past cohabitation.

Assuming however that the Judges in the Court below found that the purchase of the property in the plaintiff's name and the transfer to her did amount to a donation, then the only two questions to be decided on appeal were:

1 Was such a gift valid having regard to the relationship which existed between the parties at the time the gift was made, and

2 If it was valid in its inception could it be enforced inasmuch as it was tainted by immorality.

With regard to the law on the subject there appeared to be considerable conflict amongst the Dutch writers. *Groenewegen (De leg ab Cod 5, 27, 1, 2, and De donationibus. Dig, 89, 5, 1, 2).* was

clear that by modern custom what has been given to a concubine by her supporter can be taken away from her as being a worthless woman. (See also *Voet 24, 1, 15.*)

Voet (28, 6, 6) cites *Argentraeus*, who agrees with *Groenewegen*, but expresses no decided opinion himself.

Van Leeuwen (Cen For 3, 4, 41) disagrees with *Groenewegen* and *Sande (De alien rerum proh. 1, 2, 7)* is of opinion that a gift made to a prostitute cannot be taken from her.

In such conflict of authority the general policy of the law should be regarded. The law looks with great suspicion upon contracts entered into between persons living in a state of concubinage as the parties to this suit at the date of the purchase, and if such persons go to law to enforce contracts made while they were living in a state opposed to the general policy of the law they should be refused relief.

The contract or arrangement between the plaintiff and the defendant being tainted by immorality, the Court below should have declined to entertain the action and should have given judgment for the defendant.

The appeal should be allowed.

Mr. Searle, for the respondent, submitted that unless the Court went the length of holding that gifts to concubines were absolutely void, the respondent must succeed, as the gift was completed. The question of immorality was not raised in the plea, and could not now be considered.

Mr. Sheil in reply.

The Court dismissed the appeal.

The Chief Justice said: If the defence had been taken in the Court below that the house had been transferred to the plaintiff for an immoral consideration, then the authorities cited by the defendant's counsel, in his able argument, would have had an important bearing on the case. But no such defence was raised and the only evidence given in the Court below was directed to the question whether the transfer was intended to be an out-and-out gift. If the gift was a completed one the question as to the impropriety of the donor's motives could not arise as between the donor and donee themselves. The action was brought not for the purpose of enforcing a promise to transfer the house to the plaintiff, in which case no doubt the immorality, if any, of the consideration for the promise would have been a good defence, but the action was to recover the purchase price of the house, which, after being duly transferred to the plaintiff, was sold by the defendant under a power of attorney given by her. There is an irreconcilable conflict of opinion between the writers quoted as to the validity of donations made by men to women with whom they are carrying on illicit intercourse. Some of them hold that every such

donation is null and void, others again confine the prohibition to cases where the donation is made in consideration of future illicit intercourse and where the intercourse is adulterous or incestuous, and others hold that the question whether the gift was made for the purpose of procuring the illicit intercourse only becomes important when the gift has not been completed. Strangely enough *Sande* (Restraints on Alienation, 1, 2, 7. Webber's Translation p. 59), who is relied upon by most of the later writers as an authority for the view that the gift is null and void, expressly says that when the gift has been made to a prostitute for the purpose of procuring her prostitution, it should be seen whether the thing has been given and transferred or whether only a promise has been given. In the former case, he says, the thing cannot be taken from her, in the latter the promise cannot be enforced. This view is quite in keeping with the elementary rule of the Civil law and of our own law, *Quum par delictum est duorum, semper oneratur petitor, et melior habetur possessoris causa* (Digest 50, 17, 154). It is this view also which must have been entertained by the defendant's advisers when they confined the pleadings in the Court below to the question whether the transfer was intended as a completed gift to the plaintiff. Upon this question there can be no manner of doubt. The transfer was absolute and unconditional, and the power of attorney under which the defendant sold the property expressly states that the acts done thereunder should be done for the plaintiff and for her account and benefit. The evidence was amply sufficient to justify the judgment of the Court below, and the appeal must therefore be dismissed with costs.

Mr. Justice Buchanan: I concur. It is impossible in the appeal before us and on the defendant's plea to decide the interesting questions raised by Mr. Sheil in argument.

Mr. Justice Upington also concurred.

[Appellant's Attorneys, Messrs Van Zyl & Buissinne; Respondent's Attorneys, Messrs C. & J. Buissinne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

BLAKE AND OTHERS V. LOUW. { 1893.
Aug. 29th

Promissory note — Signature — Denial —
Agent—Action

In this case, which stood over from 1st August last, provisional sentence was prayed upon a promissory note for £18 14s signed by the defendant's wife with his authority, in favour of one Devenish, and endorsed over by him to the first-named plaintiff.

On the 1st August last, when provisional sentence was prayed, affidavits were filed for the defence, in which the defendant denied his signature, and his wife alleged that she never signed promissory notes on behalf of her husband.

Owing to this defence, the Court ordered the matter to stand over for evidence as to the signature, and the case now came on for hearing.

Mr. Juta appeared for the plaintiffs, and Mr. Searle for the defendants.

Mr. Juta, having stated the facts, submitted that the onus was on the defendant to prove that the signature was not his.

Mr. Searle, in reply, referred to *Louw v. Harris and Freeman* (Buch., 1876, p. 148).

The Chief Justice: The plaintiffs must prove that the signature is the defendant's.

Evidence was then called.

Mr. Augustus M. Devenish deposed that he lived in the district of Prieska, and had acted as sub-agent for Mr. Blake, who was district manager of the Equitable Life Assurance Society of the United States. He was now acting for the English and Scottish. On May 18, 1892, he went to Mr. Louw's farm, in the district of Wellington, in company with Mr. Booysen, who introduced him to defendant and his wife. After recommending insurance Mr. Louw said he wanted his three sons insured, but as one was absent in the Free State he could only make out proposals for two. The original proposals were sent to America.

Mr. Searle said it was important that the original should be produced.

The Chief Justice: Does anything depend upon it.

Mr. Searle said the eldest son was to have been called, but unfortunately he was suffering from influenza. He did not wish copies to go in because he was unable to ask the son now the circumstances under which the originals were signed.

Examination continued: The two sons, J. J. and and J. N. Louw, signed the proposals. The eldest son was examined by Dr. Marais in Wellington, who drew up a certificate and forwarded it to the company. Mr. Louw said he had no spare money just then, and Mr. Booysen said he had given the company a bill at four months for his son's insurance, and Mr. Louw could do the same. A promissory note was then made out by witness. Mr. Louw was shortsighted and could not find his glasses, and asked if Mrs. Louw might sign for him. Witness consented, and told Mr. Louw to sign her husband's name and not her own. It was

signed in the presence of witness, defendant, and Mr. Booysen. He gave a receipt.

Mr. Searle said they denied a receipt was given.

Witness produced the counterfoil. The policies were for £250 each.

By the Chief Justice: The sons were not medically examined then. The company always took money before the life was accepted. If it was declined the money was immediately returned.

By Mr. Juta: Conditional policies were issued for four months.

By the Chief Justice: We would not issue them before a medical examination.

Cross examined by Mr. Searle: He had taken promissory notes of this kind before. He brought blank proposal forms with him to the farm. There were different rates of insurance for people according to age and state of health, but the Equitable made no difference in premiums from the ages of ten to twenty-five. If the life was not a first-class one they did not accept it. It was common with companies to "load" the premium if the man was in bad health, but that was not the custom with the Equitable. It often happened in his experience that a member of a family signed for the head. He left the Equitable because he got better terms with his present company. He heard some time after the due date of the note that the defendant repudiated liability. Mr. Louw declined to insure his own life, because he said he was so old, and the premium would be too high. Defendant suggested the insurance of his sons' lives himself. He was agent for Blake.

By the Chief Justice: The note was endorsed with my consent by Mr. Hayward in Mr. Blake's office.

Richard James A. Johnstone, Cape Town, cashier to the Equitable Life Company, deposed that the original proposals and medical certificates, passed through his hand. They came from Blake and had been forwarded to America. Conditional policies were forwarded in June, but he could not say whether they were addressed individually to the sons or to the father. On September 30 they were returned, with a letter from the eldest son stating that as the policies did not comply with what the agent had led them to expect they returned them. On the 10th October the letter was answered, and the two final policies sent to J. J. Louw. These policies had never been returned.

Mr. Searle said they denied all knowledge of that letter.

Examination continued: He remembered that before issue of summons the defendant came in to Lindley & Wood's office and said he would pay the amount of the note, but that he ought not to be asked to pay the costs. He afterwards in Mr. Berrange's office offered to pay the note.

Cross-examined by Mr. Searle: Defendant

denied his signature to the note. Blake was dismissed from the company's service, his financial position not having been considered satisfactory.

Mr. J. C. Hinsbeek deposed that he was in charge of the records of the Resident Magistrate's Court at the Paarl. The defendant J. N. Louw, was a field cornet, and as such it was his duty to forward certain documents to the Magistrate's Court. He produced a number of these purporting to be written and signed by Mr. J. N. Louw, but they were signed in a lady's handwriting.

The documents were handed in for comparison with the signature on the note.

Mr. Johan F. Pentz, Wellington, deposed that he had been for some time a director of the Wellington Bank, now fully liquidated. Defendant had dealings with the bank in promissory notes, and on one occasion when a note was signed in a woman's hand the manager was directed to make inquiries, and reported that Mrs. Louw had signed for her husband with his authority. If the note in the present case were sent in he would have taken it to be signed by Mrs. Louw.

Mr. William Adolf Joubert, Wellington, who had been chairman of the Wellington Bank, corroborated the evidence of the last witness.

Mr. C. J. Leibbrandt, manager of the Standard Bank, Wellington, produced a number of documents purporting to be signed by Mr. Louw, but bearing his wife's signature.

Cross-examined by Mr. Searle: Defendant never signed "senior" after his name. He came into the bank on other business after the note was due. He denied his signature, and said the note should not be passed to his debit.

For the defence,

Mr. P. J. Booysen deposed that he introduced Devenish to defendant. They commenced talking about insurance, and Louw refused to have anything to do with it. Mrs. Louw joined them about ten minutes after they entered, and while they were talking witness went out. He saw no documents signed. The insurance of the sons' lives was spoken of.

By Mr. Justice Upington: I gave a promissory note to the company in payment of the premium on my son's life. I don't remember saying to Louw on this occasion that I had done so, or telling him he could give one also.

Mr. J. N. Louw, the defendant, corroborated the evidence of the last witness with reference to the introduction of Devenish. He declined to insure, as he was too old, and he said he was not anxious to insure his boys. He consulted his wife, and she said the same. He asked Devenish to wait until he could sell his produce, in September, when he would talk to him about it. There was not even a question at the interview of signing a promissory note. He told Mr. Leibbrandt in the bank that he had signed no promissory note.

The bank manager said it was his name but not his signature. He told him to send it back. He never signed "senior" after his name. His wife sometimes wrote letters and documents for him to be sent to the Magistrate. He always denied the signature, but had said that as he wished to keep the matter out of court he was willing to pay the note, but not the costs.

Cross-examined by Mr. Juta: His sons told him they were examined by Dr. Marais. He came to the farm to examine the younger son, but neither he nor his wife saw him. He saw the policies when they came, but could not say how long his sons kept them. His wife did most of his correspondence, but did not carry on all his business, as he was the "baas." She signed promissory notes for him at certain times. He could not explain why his wife, in her affidavit, stated that she never signed one for him. Mr. Bam, canvasser for, another insurance, wrote the letter to Equitable, signed by his son, J. J. Louw. He didn't instruct Mr. Bam to write it, and did not know how he found out what to put in it.

By the Chief Justice: Devenish did not ask me the age of my father, who died at sixty-four, nor of my father's mother, who is aged eighty. I don't know how Devenish found out these particulars.

Mr. Searle said he thought that information was obtained from the doctor.

Mrs. Elizabeth Christina Louw, wife of the defendant, gave corroborative evidence. She absolutely denied having signed the promissory note. She signed nothing on the day in question.

By Mr. Juta: She did not know how Devenish got the ages of her sons and where they were born. The youngest son would not know all about his grandfather and grandmother, and she did not know how he could tell the doctor about these things. She took no notice of the policies. Her husband gave Bam instructions to write to the Equitable, and the letter was written in her house. Her sons were not in court. They were on the farm, and one of them had a cold.

Devenish, recalled by the Court, reiterated his evidence. He did not know if the word "senior," after J. N. Louw, was written by Mrs. Louw, it might have been put in afterwards by himself to distinguish the defendant. His commission was 6 per cent. on the amount of the note. He had a salary and a small commission. He never saw Mrs. Louw's signature before, and was not aware that she was in the habit of signing for her husband.

Alfred Walter Bam, called by the Court, deposed that on September 30 he wrote the letter to the Equitable at the request of the defendant's sons. It was signed by J. J. Louw. The father was present, but said he had nothing to do with it. Nothing was said about the premium having been

paid, but they spoke about some paper in the bank which they said was a forgery.

Mr. Justice Upington: Why did you not put something in the letter upon that important point of the promissory note?—They did not instruct me.

The Chief Justice: The policies were sent back not because there were no negotiations for insurance, but because they alleged they were different from what they expected?—They did not really insure.

This concluded the evidence.

The Chief Justice: Is your case, Mr. Searle, that Devenish, for the sake of a couple of shillings commission, deliberately forged this document?

Mr. Searle: We say there was something of the sort between Devenish and Blake.

The Chief Justice: No, you cannot bring Blake into it. Is it your case that Devenish, a perfect stranger, without any knowledge of Mrs. Louw's signature, or that she had been in the habit of signing for her husband, forged this signature and committed this deliberate fraud?

Mr. Searle was heard for the defendant.

Mr. Juta was not called upon.

Judgment was given for the plaintiffs.

The Chief Justice said: The mode adopted by the agents of this company in obtaining insurers certainly appears to me to be most extraordinary. It seems to have been by no means unusual for them to obtain promissory notes from persons upon the application being made, and before there had been a medical examination, or before there had been an acceptance by the company. The result is that the agents of the company can have these notes discounted, and if they get into the hands of third parties, and there is ultimately no acceptance by the company, the makers of the notes may lose the amount. If in this case the defence had been this improper course of proceeding, I could have understood it, or if the defence had been that there was no consideration, or that there was a subsequent failure of the consideration upon which the signature was given, I could have understood it. Originally it must, I think, have been intended to set up that defence if I read aright Mr. Bam's letter of the 30th September, but when they discovered that this note itself, on the face of it, had a suspicious appearance, then the defence was set up that it never was signed by the defendant, or with his authority. Therefore the only question we have to decide is whether the defence has proved that the note was not signed by the defendant or with the defendant's authority. Now I regret to say that I have come to the conclusion that it was so signed, not by the defendant himself, but by his wife with his consent and with his authority. It is true that there is only one witness on the one side, and that there are

three witnesses on the other, but we must look to all the circumstances in this case in order to decide which is correct. Mr. Devenish had clearly no interest in the matter except the possible few shillings that he might derive as commission, and it is said seriously that for these few shillings he may have forged the note, as he would have to do if the defence is correct. It seems more probable that these three persons may have utterly forgotten what took place on the occasion when the note was signed than that Mr. Devenish committed forgery, for no other purpose excepting that of obtaining a few shillings. Then again he was an utter stranger, and it is not suggested that he could have known Mrs. Louw's signature, or that she was in the habit of signing letters and documents for her husband on previous occasions, that he had been in the Magistrate's Office, or that Mr. Louw required spectacles. And further, it is not suggested how Devenish could have got the information as to how to imitate Mrs. Louw's signature. He never saw Mrs. Louw's signature, and if this is a forgery, it was done by a person most expert in forgery, and who had frequently seen her signature. It is not suggested that he ever saw the signature, or that he saw the documents at the Magistrate's Office, or the signature at the bank. How then could Devenish know the signature so well? It seems to me on the face of it that all the probabilities are in favour of the plaintiffs. A remarkable statement was made by Mrs. Louw in her affidavit that she had never signed her husband's signature to a promissory note, but when confronted with the signature upon the documents produced she says that she was not in the habit of doing it, but there is a clear statement in her affidavit that she never signed a promissory note for him. On the 80th of September, according to the defendant's own evidence, instructions were given to Bam to write to Cape Town, and the instructions given are quite inconsistent with the present defence. At that time the defendant Louw was fully aware that this very note had been sent to the bank at Wellington for collection. One would have thought that it would be mentioned in the letter that there was a note purporting to be signed by him, and that he had never signed such a document. But the letter is silent on this question of the note, and the defence is set up that the note was not signed by him or with his authority. For these and other reasons the Court is bound to come to the conclusion that the signature has been proved. I am loth to say that these three witnesses came to swear what is false. I would rather be charitably disposed to say that their memories are short, and that they entirely forgot what took place. Provisional sentence will therefore be given with costs.

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Mr. Juta applied for double costs.

The Chief Justice said that if ever there was a case in which double costs should not be given it was this case, on account of the loose manner in which the company conducted their business.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. J. C. Berrange & Son; Defendant's Attorney, C. C. de Villiers.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN and
Mr. Justice UPINGTON]

LONDON AND SOUTH AFRICAN EX-
PLORATION COMPANY V. DE 1898.
BEERS MINES. Aug. 80th.

The Chief Justice said that with reference to the order made on Monday for inspection of the depositing-floors in dispute by Captain Quintrall, the Registrar of the Court had received the following telegram from that gentleman: "Will proof of existence of yellow ground or otherwise in claims in question be sufficient, or must a fair quantity be broken and washed to prove whether it contains diamonds or not. Yellow ground in Du Toit's Pan mine was diamondiferous, but if yellow ground is found in these claims it will be impossible to say whether it actually contains diamonds or not, unless a quantity is broken and washed, and that will involve considerable labour. Am waiting instructions on this point to guide me in necessary work."

The Chief Justice remarked that the inspection would be of no use unless it were a thorough one, and a wire to that effect would be sent in reply.

DORMEHL V. DORMEHL. { 1898.
Aug. 90th.

This was an action for divorce instituted by Mrs. E. J. P. Dormehl against her husband on the grounds of his adultery.

The declaration alleged that the parties were married at Hanover on 16th July, 1887.

That there were three children born of the marriage.

That in June, July, and August, 1892, the defendant committed adultery.

The prayer was for a decree of divorce, the custody of the children, and costs of suit.

Mr. Searle appeared for the plaintiff; the defendant was in default.

Mr. Norman Lacy, of the Colonial Office, produced the register containing the entry of the marriage.

Elizabeth Johanna E. Dormehl, the plaintiff, deposed that she was married to the defendant in Hanover on July 16, 1877. They lived there happily for a year, but her husband afterwards ill-treated her, and on one occasion he was punished by the Magistrate for assaulting her. She left him because he severely beat her, but after a year she was induced by his relatives to return. Last year a coloured girl named Sabina, who had been living with them since their marriage and who was aged about 18 or 19, told her that she had misconducted herself with defendant. Sabina gave birth to a white child afterwards. Since then plaintiff had not cohabited with defendant.

Sabina was examined and deposed to the adultery. Defendant was the father of her child.

The decree was granted as prayed, with costs

PERFECT V. PERFECT. { 1898.
Aug. 30th.

This was an action for divorce instituted by James Perfect against his wife on the grounds of her adultery.

The declaration alleged that the parties were married in Cape Town on 28th October, 1882.

That there were two children living issue of the marriage.

That the defendant committed adultery in 1892 and 1898 with one Knight, with whom she was at present living.

The prayer was for a decree of divorce, custody of the children, and costs of suit.

Mr. Graham appeared for the plaintiff; the defendant was in default.

Mr. Norman Lacy, of the Colonial Office, produced the register containing the entry of the marriage.

James Perfect, the plaintiff, deposed that he was married to Elizabeth Ann Bolton on October 2, 1882, in Cape Town, where they resided for some years. After being married a few months he got some anonymous letters. He discovered his wife was not sober, and he had to carry her home tipsy on one occasion. While living in Lelie-street his wife was familiar with one of the lodgers. He went to England afterwards in the Boadicea, and remained absent six months, having provided a situation for his wife as cook in the Y.M.C.A. In May, 1888, he went to Griqua town as gaoler, and there he met a man, named Knight, who was Chief Constable, and whom he afterwards saw in his office having connection with his wife. After that he lived no longer with his wife. He came down to Cape Town, from which he sent her money and clothing from time to time. He obtained an appointment for her as second matron in

Cape Town gaol at £50 a year, but she refused to accept it. About eight months after he left Griquatown he heard his wife was at the Royal Navy Hotel in Cape Town, and saw her there. The children of the marriage were with her; he went to the hotel and saw one of them dancing the can-can in an indecent manner. He noticed that his wife was *enceinte*. He had been married and divorced before. He brought the action against his former wife for malicious desertion, she having left him for twelve years.

In reply to Mr. Justice Upington, he denied that he had made other charges against his wife, or received or demanded money for compromising claims against persons in connection with his wife.

Evidence having been given that defendant had given birth to a child eighteen months after plaintiff had ceased cohabitation,

The Court granted a decree for divorce as prayed.

[Plaintiff's Attorney, J. Hamilton Walker.]

HOLDWAY V. HOLDWAY. { 1898.
Aug. 30th.

This was an action for divorce instituted by Richard Holdway against his wife Bridget Holdway (born Conlan), on the grounds of her adultery.

The declaration alleged that the plaintiff was lawfully married, in community of goods, to the defendant at Port Elizabeth on or about the 16th day of October, 1876, and that the marriage was still in full legal force and effect. That on divers occasions during the years 1892 and 1893, the defendant wrongfully and unlawfully committed adultery with several persons to the plaintiff unknown.

The plaintiff claimed:

(a) A decree of divorce.

(b) A declaration that the defendant had forfeited all benefits arising from the marriage in community.

(c) Alternative relief, with costs of suit.

Mr. Sheil appeared for the plaintiff; the defendant was in default.

Mr. Norman Lacy, of the Colonial Office, produced the original marriage certificate.

Mr. Richard Holdway, plaintiff, deposed that he was an engine fitter on the Cape Government. He married the defendant in Port Elizabeth on the 16th October, 1876. From the time of his marriage until about five years ago he lived happily with the defendant. At that time they were living in South America. Subsequently his wife took to drink, and became so bad that he at last sent her to her parents in Port Elizabeth, thinking that they might be able to keep her straight. He supported her while she was living with her parents. He returned to the Colony about two years

ago. His wife was then at Graham's Town. He sent his son to bring her to Cape Town. She continued to drink. He and his wife lived with his parents at Salt River, but she went on so badly that they had to leave the house. They then went to Loop-street, with the same result. After that witness was removed up country. He and his wife agreed to separate. He made her an allowance. In consequence of information he received he instituted the present proceedings. The photo (produced) was a picture of his wife, and was torn by her yesterday when he was in the Lock Hospital seeing Dr. Dixon. This morning he accompanied Dr. Dixon to the brothel in which his wife was living, and identified her as his wife in Dr. Dixon's presence.

Dr. John Francis Dixon, examined by Mr. Sheil, deposed: I am a medical practitioner, and am at present Medical Superintendent of the Lock Hospital, Cape Town. I recognise the photo (produced) as being that of the defendant. She is a prostitute, and is known to me as Polly Holloway or Holdway. She was registered as a prostitute on 18th October, 1892. She had been frequently examined. She was examined on 22nd December, 1892. On that occasion she signed a voluntary submission to examination in terms of Act 39 of 1886, section 14. She had been four times in the hospital suffering from a venereal disease.

The Court granted a decree of divorce as prayed with costs.

[Plaintiff's Attorney, W. E. Moore.]

WESSELTON SYNDICATE V. THE { 1893.
COLONIAL GOVERNMENT. { Aug. 30th.

Railway regulations — Machinery — Undamageable iron — *Restitutio* — Protest.

By the Railway Regulations of the Colonial Government the freight for "machinery" is charged at second-class rates, and for "undamageable iron" at ten per cent. less.

The plaintiffs having imported certain iron machinery in separate pieces, and entered it in the Customs as "machinery" so as to save the import duty, sent it by railway to Du Toit's Pan.

In the consignment notes they described the articles as "undamageable iron," but the Railway Department charged them as for machinery.

The amount having been paid under protest, the plaintiffs now sought to recover the difference.

Held that, *although some portions of the machinery might, if imported and consigned separately, have been fitly described as "undamageable iron," the consignment as a whole was properly charged for as "machinery," and that the plaintiffs were not entitled to recover the difference between the two rates.*

This was an action instituted by Messrs. Lookhart & McLelland, carrying on business in partnership, under the style or firm of the Wesselton Contract Syndicate, at Du Toit's Pan, Kimberley, against the Colonial Government for the sum of £332 17s. 7d.

The declaration alleged that in the months of January, February, March, April, and May, 1893, the plaintiffs imported into this colony for the purposes of their business certain portions of machinery and other undamageable iron, and the said articles were thereafter conveyed by the Colonial Government Railways from Port Elizabeth to Du Toit's Pan.

The said articles were of iron and undamageable, and were duly described by the plaintiffs' agents, and were received by the Colonial Government Railway servants as such, to be conveyed in accordance with the railway regulations in that behalf at a rate of 10 per cent. less than ordinary second-class rate for goods conveyed upon the said railways.

Thereafter the defendants contended that the said articles were not entitled to any reduction of rate and refused to deliver them to the plaintiffs unless the carriage was paid at the full second-class rate for goods.

In order to obtain delivery of the said articles, which were urgently required for the purposes of their business, the plaintiffs paid under protest the amount of the full second class rate, and they have now, as they are entitled to do, called upon the defendants to refund the 10 per cent. wrongfully and illegally charged as above, but the defendants have refused to comply with the said demand or to return any portion of the said sum.

The amount so illegally charged by the defendants is £332 17s. 7d.

The plaintiffs claimed the sum of £332 17s. 7d., with interest *a tempore moræ*, alternative relief, with costs of suit.

The defendants in their plea admitted that during the months referred to in the declaration the plaintiffs imported into the Colony for the purposes of their business certain portions of machinery and iron, but they denied that the whole of the said portions of machinery and iron was undamageable. They admitted that the said

articles were conveyed as alleged in the declaration.

The defendants admitted that a portion of the articles so conveyed as aforesaid, to wit, 89,780 lb. in weight, was undamageable with the meaning of the railway regulations, and was treated as such, and plaintiffs were allowed a reduction of 10 per cent. thereon upon the second-class rates, as provided for under the said regulations, but they denied that the remainder of the said articles, to wit 896,579 lb. in weight, was so undamageable, and said that the said articles were erroneously described as undamageable upon the consignment notes referred to, and were not received as such by the defendants, and were not entitled to the reduction of 10 per cent. as contended by the plaintiffs.

The defendants denied that any charge had been wrongfully and illegally made, and prayed that the plaintiffs' claim should be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Searle and Mr. Watermeyer appeared for the plaintiffs, and Mr. Schreiner, Q C, A.G., and Mr. Giddy for the Government.

Joseph Morton deposed that he was secretary of the syndicate which had imported during this year, between January and May, certain articles of machinery and undamageable iron. He produced the invoices of the articles, various receipts and returns of the different kinds of machinery and iron carried. The articles were tabulated in a schedule, which he produced.

Mr. Schreiner said that all these articles had passed through the Customs-house free of duty as machinery.

Mr. Searle said a number of articles were mentioned in the list under the heading of undamageable iron.

Mr. Justice Upington said it was a serious matter to say now they were not machinery when they were taken through the Customs-house free as machinery.

The witness further stated that several of the articles were practically undamageable.

In reply to Mr. Schreiner, he said the articles were all imported with a view to erecting diamond-mining machinery.

Thomas Gibson McLelland, one of the plaintiffs, deposed that he had been manager and engineer to several prominent companies in Kimberley, and had been chief engineer to De Beers. The object of the syndicate was to haul and work a certain quantity of ground in the Wesselton mine. The greater portion of the articles came out in some sort of bar form, and several of them corresponded to the exact terms of the clause in regulations relating to undamageable iron. They have all to be put together on arriving at Kim-

berley, and in some instances had to be treated in the workshop. Most of the bars imported had holes drilled in them, but some had not. They got a rebate on the first consignment. Roughly speaking, 80 per cent. of the whole consignment was undamageable. He claimed on 40 per cent. Nothing was damaged in transit.

By Mr. Schreiner: The invoices particularised the nature of the contents of cases. The whole consignment was for the purpose of the machinery. He had no doubt that it passed free through the Customs-house as diamond mining machinery.

The Chief Justice asked what the amount of the Customs dues would be if it were not machinery.

Mr. Schreiner said they should have to calculate on the different articles if they were at a special rate. The others would be charged 12 per cent., and the average would be about 17 per cent.

The witness said he did not know the value of the consignment, but admitted that the Customs dues at an average of 15 per cent. would be some thousands of pounds.

Mr. Justice Buchanan said that, roughly speaking, £85,000 worth of goods had entered duty free.

Archibald T. Craven, storekeeper in De Beers Mine, deposed that the De Beers Company imported articles similar to those in dispute in the present case and on some of these rebate was allowed, such as plates of iron, channel and angle iron, chains, bolts, nuts and rivets.

By Mr. Schreiner: He did not know anything about the Customs. He could not say if on anything imported as machinery and passing free through the Customs-house rebate was allowed. They had large workshops at De Beers, where they worked up a lot of stuff to replace portions of machinery.

Samuel H. Palmer, of Palmer, Walmsley & Co., Port Elizabeth, deposed to landing the goods and forwarding them. No official protest was received as to sending the goods as undamageable.

Mr. A. W. Howell, Assistant General Manager of Railways, gave evidence with reference to the charge for "adjuncts to machinery." He explained that he intended to convey in his correspondence that if adjuncts to machinery such as bolts and bar iron not worked up with any particular portion of machinery were carried they should certainly come under the reduced rate; but certainly not iron bars manufactured for specific purposes, fittings for any portions of machinery. Iron bars were very distinct from bar iron. The department required specifications of articles coming within the undamageable iron clause.

By Mr. Searle: He took up the position that all machinery should be charged at second-class rate. Rebate was allowed on the first consignment, but that was a mistake of the stationmaster at Beaconsfield.

Mr. Searle was heard for the plaintiffs.

The Attorney-General was not called upon.

Judgment was given for the defendants.

The Chief Justice said: This is an action to recover back money alleged to have been improperly claimed by the Railway Department and to have been paid under protest. It is not disputed that the payment was involuntary and made, under protest and that, in terms of the decision of this Court in *White Brothers v. Treasurer-General* (2 Juta, 352), the plaintiffs are entitled to succeed if the freight demanded by the department was in excess of the amount allowed by its regulations. The charge allowed for "machinery" is at the second-class rate, and for "undamageable iron" at ten per cent. less. The articles in question were imported in separate pieces as "machinery" and were accordingly admitted free of duty. But when the plaintiffs came to consign the machinery by railway to Du Toit's Pan they entered a considerable portion of it on the consignment notes as "undamageable iron." The question to be determined is whether portions of machinery which, if imported and consigned independently of any machinery, might fall under the denomination of "undamageable iron," must under the regulations be carried at the reduced freight even if they have been imported and are conveyed as component parts of machinery not yet put together. Mr. Searle's contention is that only machinery put together, as such, falls under the second-class rate, but that the component parts, if not put together, fall under the 10 per cent. reduction so far as they can come under the denomination of "undamageable iron." The apparatus of machinery consists of several parts, and all the component parts together constitute the machinery. For the purpose of customs duties it has always been so held, and there is no reason why a different construction should be placed upon the word when a question of railway freight arises. Certainly the plaintiffs themselves adopted this construction when they entered the self-same articles as forming part of diamond-mining machinery. No such difficulty arises in the present case as might arise where articles are consigned which, although intended for machinery, do not form component parts of a more or less complete set of machinery. All the articles in question were imported as machinery and they did not cease to be such when despatched by the Government Railway to Du Toit's Pan. The judgment of the Court must therefore be for the defendant with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arden; Defendant's Attorney, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

SMITH V. G. F. DU TOIT. { 1898
Aug. 31st

On the motion of Mr. Sheil, the final adjudication of the defendant's estate was decreed.

ROSS AND CO. V. FREEMAN.

Mr. Watermeyer moved for compulsory sequestration of defendant's estate.

The order was made as applied for, and Mr. Currey appointed provisional trustee.

DUNCAN V. BEYERS.

Mr. Barber moved for judgment under Rule 829 for £20, money lent, with interest from the 7th June, 1890.

Granted.

SCOTT V. SHELTON.

Mr. Watermeyer moved for judgment for £60 8s. 11d, balance due for goods sold and delivered, less £15 paid since issue of summons.

The order was granted.

ADMISSION.

Ex parte GIBBON. { 1898
Aug. 31st

Articled clerk—Application for admission as an attorney—Period of service—Qualification for Matriculation Examination.

This was an application by Mr. Edward Robert Allenberg Gibbon for admission as an attorney and notary. On the 5th August, 1887, the petitioner was articled to Mr. Attorney Trollip, of Cape Town. On the 26th March, 1889, he left Mr. Trollip's office and went to the South African Republic for the purpose of entering the service of Mr. Attorney Andrew Lange-Brink, of Johannesburg. On the 12th February, 1891, the petitioner was ordered to serve seventeen months in order to complete his articles of clerkship. On the 15th May, 1891, the petitioner's articles of clerkship were transferred and ceded to Mr. Attorney Budler, with whom he remained until August 2, 1891, when the articles were ceded to Mr. Attorney

Schweitzer, with whom the petitioner remained until 20th December, 1891, when he proceeded to Cape Town to qualify himself for the Matriculation Examination which he passed in July, 1892. On the 5th August, 1892, he resumed his service with Mr. Schweitzer, and continued to serve him until June 8, 1893.

Mr. Graham was heard in support of the application, and relied on *In re Johnson* (1 Juta, 40).

Mr. Searle appeared for the Incorporated Law Society, not to oppose the application but to bring to the notice of the Court the fact that the present case had gone further than any previous case which had come before the Court for consideration. He referred to *Ex parte Smith* (4 Juta, 170).

The Court granted the application.

The Chief Justice said the danger of granting applications of this kind is that it opens the way to similar applications. Those cases in which we have already made remissions are now quoted as precedents to guide us in the present case. The circumstances certainly are special. This young man was bound to prepare himself for the Matriculation Examination before he could pass his professional examination and, therefore, it may be fairly argued that he was working for his profession. The Court will, under the special circumstances of this case, grant the application. I think the Law Society were quite right in bringing the matter before the Court, and if any costs had been incurred by the Law Society, the Court would have ordered the applicant to pay these costs.

Mr. Gibbon then took the oath of allegiance and was duly admitted.

REHABILITATIONS.

The following rehabilitations were granted on motion from the bar: Dirk Christoffel Geldenhuys, Jacobus Kayser, Barend Johannes de Klerk, Johannes Andries Grundlingh.

GENERAL MOTIONS

KOTZE V. KOTZE AND ANOTHER.

Mr. Graham moved for removal of the suit for divorce and for recovery of damages instituted by plaintiff against his wife and another from this Court for trial at Circuit Court to be held at Burgersdorp on the 18th October next. Costs to be costs in the cause.

The order was granted.

ABBOTT'S TRUSTEES V. FATIMA, OTHERWISE WILLIAMS

Mr. Barber moved for the attachment *ad fundandam jurisdictionem* of this Court of certain

lot of ground marked N. 13 of the divided estate Zonnebloem, situated in Cape Town, in an action to be instituted by edictal citation for the recovery of the amount of a mortgage bond with interest and costs.

The Court granted the order, the edictal citation to be served personally if possible, failing which one publication in the Johannesburg "Star," the rule being returnable on the 12th October.

HENNINGS V. HENNINGS.

Mr. Currey applied to make absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce.

The order was granted.

THE UNION BANK OF CAPE TOWN. } 1893 Aug. 31st.

Mr. Rose-Innes, Q.C., moved for an order in terms of the fourth report of the official liquidators.

The report had lain for inspection as ordered by the Court.

The Chief Justice: It has been brought to the notice of the Court that there has been an apparently faithful servant of the bank as messenger, Mr. Smith, who had a few shares in the bank, and his wages were actually deducted to pay the amount of his call. This man is perfectly penniless, and his case deserved the consideration of the liquidators, with the consent of the shareholders.

Mr. Innes said he was informed that no part of the wages had been deducted during the liquidation. The liquidators would inquire into the matter and, if necessary, make some arrangement.

The Chief Justice: I think they would be quite justified in making some provision for a man in the decline of life and health, who has served the bank faithfully, especially if the shareholders do not object to it.

Mr. Innes said the matter would have the attention of the liquidators.

Mr. Innes then asked the Court to fix the remuneration to the liquidators. They still expected to recover £45,000 to £50,000. He suggested that for their third year they be allowed a remuneration of £1,000, which would be £8,000 for the three years, or about $\frac{1}{3}$ per cent. on the amount recovered. The hardest work of the liquidation had been during the past year.

Mr. Justice Buchanan said the report no doubt was a very satisfactory one.

Mr. Innes said it had caused the liquidators a great amount of personal trouble and research. They asked £3,000 for the year and 5 per cent. on any further amounts collected. As the maximum amount they hoped to receive was £50,000 that would give £2,500 spread over a period of probably four years.

The Chief Justice: There can be no doubt as to granting the first two paragraphs of the prayer. As to the remuneration to be allowed to the liquidators, the Court quite agrees with Mr. Innes that the work has been well done, and that it ought, therefore, to be well remunerated. The remuneration up to July, 1892, was at the rate of £2,500 a year, and we think that rate of remuneration should be continued. But as to further receipts by the liquidators, we think that the rate of commission should be increased, and that instead of 5 per cent. it should be made 6 per cent. That, I think, would make up the £500 extra for which the liquidators have asked, and although I do not think they require to be stimulated in their exertions, still I am satisfied that this addition of 1 per cent. might have some appreciable effect in that direction. The Court will therefore make an order for £2,500 remuneration for the year ending July, 1893, and 6 per cent. on all receipts after July, 1893.

[Attorneys for the Liquidators, Messrs. Fairbridge & Arderne]

CLOETE V. CLOETE.

Mr. Graham moved for removal of the suit instituted against the defendant by his wife for divorce by reason of his alleged adultery from this Court for trial at the Circuit Court to be held at Victoria West on the 29th September next. Costs to be costs in the cause.

The order was granted.

THE MASTER V. BROEKMAN'S EXECUTOR.

Mr. Giddy moved for a rule *nisi* requiring the respondent to show cause why an order shall not be granted for the attachment of his person for contempt of Court in not complying with the order on the 12th July last, requiring him to file an account of his administration of Broekman's estate.

The order was granted, the rule to be returnable on October 12, and personal service to be effected.

CHAMBERS V. CHAMBERS.

Mr. Graham moved to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against his wife for divorce by reason of her alleged adultery.

The order was made.

MALCOLM'S TRUSTEE V. CAUVIN. { 1893. Aug. 31st.

Mr. Graham moved to make absolute the rule *nisi* restraining the respondent from parting with certain cash and goods alleged to be the property of Haase, Vaughan & Co., of New York, pending an action to be instituted against the said Haase, Vaughan & Co. by applicant, for the recovery of money due to the insolvent estate.

Mr. Sheil appeared for Haase, Vaughan & Co., and consented on condition that the trustee proceeded with his action forthwith.

The rule was made absolute, process to be served on Messrs. Fairbridge & Arderne as representing Haase, Vaughan & Co.

ESTATE OF THE LATE SAREL J. DU PLESSIS AND HER SUBSEQUENTLY DECEASED SPOUSE

Mr. Searle moved for authority to the executor *dative* to submit for sale by public auction certain share in the perpetual quitrent farm Draaihoek, situated in the district of Oudtshoorn, belonging to the minor heirs of the estate, the portion owned by the major heirs being about to be put up for sale, and it being expedient that the whole should be offered at once.

The order was granted, subject to the confirmation of the minors' tutor *dative*.

FESTER V. FESTER.

Mr. Sheil, on behalf of applicant, applied for leave to sue *in forma pauperis* in an action against his wife for divorce, by reason of her alleged adultery.

The matter was referred to counsel, who must satisfy himself that the applicant is a pauper before granting the certificate.

LARY V. LARY.

On the motion of Mr. Watermeyer, the rule *nisi* was made absolute dissolving the marriage, by reason of the defendant's failure to obey the order of Court.

MOCKE V. FOURIE. { 1893. Aug. 31st.

Marriage—Breach of promise—Damages—Action.

This was an action for £500 damages for breach of promise of marriage, instituted by Jacobus Johannes Mocke against Miss Esther Fourie, both living in the district of Beaufort West.

The declaration alleged that in or about the

month of September, 1892, the plaintiff and defendant agreed to marry one another, and on or about the 19th February, 1893, it was agreed between them that their said marriage should take place on the 15th April, 1893. On or about the 20th February, 1893, the defendant absolutely refused ever to marry the plaintiff, and wrongfully repudiated, renounced, and determined the agreement on her part.

The plaintiff was ready and willing to marry the defendant on the said 15th day of April, 1893, but the defendant neglected and refused to marry him. That by reason of the aforesaid refusal of the defendant to marry him the plaintiff had suffered grievous damage.

The plaintiff claimed:

(a) £500 damages,

(b) Further relief with costs of suit.

Mr. Jones appeared for the plaintiff; the defendant was in default.

Mr. Johannes Mooke, plaintiff, deposed that he was a farmer living in Beaufort West, in which district the defendant also resided with her parents, about nine hours distant from his farm. He knew the family for a long time, and saw defendant frequently since she was fourteen. She was now twenty-eight and he was thirty. He often went over to visit the family. In September last he became engaged to defendant, and it was arranged that they should be married on 15th April last.

By the Court: He was courting her about a month before she consented. She did not write any letters to him except the two breaking off the engagement. He had no affectionate letters from her. The wedding day was fixed for the 15th of April, 1893.

Examination continued: An ante-nuptial contract was actually drawn up by an agent, Mr. De Smidt. She broke the engagement off shortly before the day fixed for the marriage.

Mr. Jones read two letters from defendant, written in January, informing the plaintiff that she was extremely perplexed that she had ceased to love plaintiff and could not marry him.

Examination continued: On receipt of the first letter he went over to see her. She asked for a month's time to consider the matter, and he gave it to her. At the end of the month he went again, and she told him there was no further hindrance and she resolved to marry him. The wedding day was then fixed, but next day she broke the whole thing off and never gave him any reason. He always treated her well and kindly. He gave her an engagement ring, a chain, a locket, and other presents.

By the Court: She offered to send them back but had not done so. She offered to give them to his nephew. He did not know that she had any means of her own. Her parents were wealthy.

His own farm was mortgaged, but not heavily. The defendant's mother was dead, and her father had eight or nine other children. He had been married before, and had one child. The instructions which he gave to Mr. De Smidt with reference to the ante-nuptial contract had reference only to his own property.

By Mr. Jones: He had very great affection for the defendant, and was very much disappointed indeed at her refusal to marry him. It would have been a very happy match, and she would have made a most suitable wife for him, he believed. She would have been able to manage his farm in his absence. Since her mother's death she had looked after her father's house extremely well, and he expected she would have done the same for him.

By the Court: She was not engaged to anyone else so far as he knew.

By Mr. Jones: He had spent a good deal of money preparing his house for her reception, and he had lost considerably, as owing to his absence courting his farming operations had gone back. On one occasion when he was away seeing her he lost sixty sheep by disease which would not have occurred if he had not been visiting Miss Fourie.

Mr. Justice Upington: Do you say that if she had carried out her contract the sheep would not have died?

Mr. Jones: No, but we say that she would have made up for it.

The plaintiff further stated that he had spent a lot of money furnishing his house for defendant.

The Chief Justice: Well, perhaps there might be another occupant found for it.

Mr. Jones said one of the claims for damages was that the plaintiff, owing to having been thrown over by the lady, was the subject of much talk and ridicule among the neighbours.

Plaintiff said he was subjected to a good deal of disgrace and ill-natured remarks about it.

Mr. Justice Upington: Perhaps chaffing would better describe it.

Plaintiff said he felt this chaffing very much. People said there must be something wrong with him when defendant refused to marry him.

The Chief Justice: It is not a very unusual thing for young ladies to jilt young gentlemen, is it?—No.

And they are none the worse for it afterwards?—I don't know.

Mr. Jones: Will it stand in the way of your obtaining a wife to look after your farm?

Plaintiff replied that he felt rather diffident about approaching any girl now. The sheep were value for 10s. a head.

By the Court: He thought the young lady had some cattle and stock of her own, but it was only

on expectancies that he relied. His farm was 6,000 morgen in extent, and he had 2,000 sheep. He was not a rich man, but could live comfortably. His first wife died six years ago. The child was seven years of age.

The Chief Justice: Do you allege that the fifty sheep were lost by this lady's default?

Mr. Jones said if the lady had carried out her contract defendant would have had a *quid pro quo*. He did not care what it cost him if he had only got her.

The Chief Justice: What good would the *quid pro quo* have been to him if, as she says she did not love him, she came to him as a wife without affection.

Mr. Jones said plaintiff no doubt considered he had love enough for two, and after all that statement might have been only coyness on her part.

Mr. Jones was heard on the question of damages. Judgment was given for the plaintiff.

The Chief Justice, in giving judgment, said: I cannot find that our law makes any distinction between the case of a man suing for damages for breach of promise of marriage and a woman suing for breach of promise of marriage. In either case damages are recoverable, if there has been a deliberate breach of the promise to marry and consequent damages sustained by the party. Fortunately, cases of this kind very rarely occur in this court. It is seldom found here that even a woman brings an action against a man for breach of promise to marry. In the case of a woman, it is generally found that the woman who brings an action has lost a social position by reason of the refusal of the man to carry out his promise, and in many cases it has also been found that she has lost many advantages which would have accrued to her from her marriage with a man who would support her and give her a position in life. In such a case, no doubt, the Court would give reasonable damages for breach of promise. In the present case the action is brought by a man, who admits that he has been married before; that he is in a position to maintain himself and his child, and that although he is not a rich man he is fairly well off, and has got a farm and sheep, and really he has not lost any position in life by not marrying this lady. If her conduct had been heartless in the matter, if he had proved any heartlessness in her jilting him, no doubt the Court might mark its sense of her conduct by giving damages against her. But nothing is shown here beyond an ordinary case of a young girl who, not knowing her own mind very well, consents to marriage, but when she comes to consider the case, finds that she has not quite the affection for the man that a wife ought to have for her husband. She admits that she gave a promise to the man, but on reconsidering the matter she found she had

not for him that affection which a wife should entertain for her husband. She tells him what her feelings are, and writes twice to him on the subject, that she had a great struggle in the matter, and had come to the conclusion that they could not live happily together. She advised him also to reconsider it. It seems a very sensible thing on the part of the young lady, and if this man had been sensible also he would have accepted it. No doubt it was a great disappointment, but he should have taken it like a man instead of bringing this action. Still he has a right to bring his action if he can prove that he sustained any damages. The young lady had no property; her parents were well off, but it was not proved that they would give her anything on her marriage. Under all these circumstances we are of opinion that substantial damages have not been proved, but as it is necessary that some damages should be given we think one shilling will satisfy the justice of the case. We make no order as to costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Findlay & Tait.]

MATHEWS V. MATHEWS. { 1898. Aug. 81st.

This was an action for divorce instituted by Mr. Abraham Pieter E. Mathews against his wife by reason of her adultery.

The declaration alleged that the plaintiff resided in the Transvaal and the defendant in Cape Town.

That the parties were married at Cape Town on the 10th April, 1889. That there was one child of the marriage. That during the year 1892, and more particularly during the months of August, September, October, and November, 1892, the defendant committed adultery with some person to the plaintiff unknown.

The plaintiff further said that in the month of May, 1893, and at Stellenbosch, the defendant was delivered of a child of which the plaintiff was not the father, the plaintiff not having had access to the defendant since the month of May, 1889.

The prayer was for a decree of divorce, custody of the child, and costs of suit.

Mr. Graham appeared for the plaintiff; the defendant was in default.

Mr. Norman Laoy, of the Colonial Office, produced the Marriage Register.

The plaintiff deposed that he was married to the defendant on the 10th April, 1889. Shortly after his marriage he went to Bloemfontein to take up an appointment in the National Bank. His wife remained in Cape Town with her mother. He left Bloemfontein in December, 1889, for Johannesburg in search of employment, which he

obtained in the following February in the Natal Bank, where he remained until April, 1892. His salary was so low that he could not send for his wife, but he sent her as much money as he could. In April, 1892, he obtained an appointment in the National Bank, Pretoria. At present he was in the Potchefstroom branch of the bank, and had latterly been sending his wife £5 a month regularly. Two or three months ago he suggested his wife's rejoining him, but he received no reply to his letter making this suggestion. He instituted the present proceedings in consequence of information which he had received in an anonymous letter. He identified the photo produced as that of his wife. There was one child of the marriage, a girl, who was born in June, 1889. He was willing that the mother should have its custody.

Aletta Maria Daniels deposed that she was a midwife, and lived in Stellenbosch. The lady whose photo was produced was confined in her house in May last. The lady passed under the name of Mrs. Brown. When the child (a girl) was a day old its mother gave it away to a Malay woman. Ten days after the birth of the child, the lady left with a gentleman who had come for her.

Christian Daniels also identified the photo, and corroborated his mother's evidence.

The Court granted a decree of divorce.

Mr. Justice Upington remarked that the appointment of a Queen's Proctor was well worthy of the consideration of the Legislature. Personally, he was not satisfied that collusion did not exist in many cases which came before the Court.

[Plaintiff's Attorney, C. C. Silberbauer.]

SAMUELS V SAMUELS.

1898.
Aug. 31st.
& Sept. 12th

Action for divorce on the grounds of adultery.

The declaration alleged that the parties were married at Worcester on the 8rd October, 1876.

That there were four children born of the marriage.

That on divers occasions during the present year but more particularly on or about the 26th day of March, at Durbanville, the defendant committed adultery with one Sana.

The plaintiff claimed a decree of divorce, custody of the children, and costs of suit.

Mr. Graham appeared for the plaintiff; the defendant was in default.

Elizabeth Samuels, the plaintiff deposed that she was married to the defendant in St. James's Church, Worcester, on 8rd October, 1876. Her husband treated her cruelly. On two or three

occasions she caught defendant in the act of adultery, on these occasions she forgave the defendant. Subsequently however he committed adultery with one Sana Lountjes, and this she had not forgiven. Defendant admitted after the case in Court that he had committed adultery with Sana.

Mr. Justice Upington asked what the nature of the case was and why the records were not produced. If the records were produced it might appear that adultery had not been committed with the girl Sana. He was not by any means satisfied with the evidence given in this case and would decline to express any opinion until more satisfactory evidence was produced.

Mr. Graham remarked that the Special Justice of the Peace at Durbanville had been written to for the records, and he had replied that there were no records. It was a pauper suit, and the plaintiff could not afford to pay the special J.P.'s expenses to Cape Town.

Sana Lountjes deposed that she knew the defendant, and that he had connection with her one Sunday evening after church. On the following day she complained to the Special J.P. but the case against the defendant was dismissed.

The Court ordered the case to stand over for further evidence as to the adultery.

The further hearing took place on 12th September, when Mr. O. J. Horak, examined by Mr. Graham, deposed that he was a Special Justice of the Peace at Durbanville, and knew the plaintiff, Elizabeth Samuels, and her husband James Tobias Samuels. He also knew a woman of bad character, named Sana Lountjes, with whom the defendant, in the presence of his wife, admitted that he had committed adultery in March last.

Mr. Graham said that when the case was previously before the Court the woman Lountjes was examined and admitted the adultery.

Mr. Justice Upington pointed out that it would be easy, if the husband and wife were in collusion to dissolve this marriage, to obtain the assistance of this woman.

Mr. Graham said there appeared to be nothing of the sort in the case. The wife had stated in the witness-box that this occurred on former occasions, and she had forgiven him, but since the last occurrence she had not cohabited with him.

The Court granted a decree of divorce.

[Plaintiff's Attorney, J. Hamilton Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

SEARLE AND GILBERT AND
SULLIVAN V BONAMICI AND } 1898.
PERKINS. } Sept. 1st.

Mr. Rose-Innes, Q.C., made an *ex-parte* application to vary the order of the Court made on the 19th May, by which Messrs. Bonamici and Perkins, managers of the Lyric Opera Company, were ordered to pay 10 per cent. of their receipts from Gilbert and Sullivan's operas to the Deputy-Sheriff of King William's Town. The affidavit of Mr. Buissinne stated that the Lyric Company was performing in the New Theatre, Cape Town, and had announced in the newspapers their intention to play some of Gilbert and Sullivan's pieces. It would be very inconvenient for the Deputy-Sheriff of King William's Town to collect the 10 per cent., and therefore application was made to vary the order by making it payable to the High Sheriff of Cape Town.

The Chief Justice: Take the order, but of course it will be competent, as no notice was given to the respondents, for them to apply to the Court to vary this order. The only thing you apply for is to substitute the High Sheriff for the Deputy-Sheriff.

Subsequently, the Chief Justice said the Registrar had informed him that there was no order of the Court to vary. The interdict was discharged upon the defendants undertaking that they would pay certain sums to the Deputy-Sheriff of King William's Town. Unless the defendants came into court and gave a fresh undertaking, the Court could not vary the original order.

Mr. Innes said his recollection was that the order had been made by consent. He would mention the matter again, and in the meantime notice would be given to the other side.

BENNETT V. MORRIS. } 1898.
} Sept. 1st.

Defamation—*Animus injuriandi*—Privilege—*Trap*—*Nulla injuria est quae in volentem fit*.

The defendant, a hotel proprietor, having found behind a shelf in the bar of his hotel a letter addressed to B., which contained defamatory matter regarding the plaintiff, and which had been left there by the plaintiff, a former

proprietor, showed the letter and its contents to the barman on the impulse of the moment, without knowing whether it was genuine or not, and with the view of discovering how the letter came to be there.

Held, that even if the occasion was not in strictness of law a privileged one, the circumstances under which the contents were made known to the barman justified the Court in holding that there was no *animus injuriandi* on the part of the defendant.

Subsequently the plaintiff informed one P., a servant in his employment and a customer of the defendant, of the contents of the letter, with a view to P.'s making use of this information to obtain a communication of such contents from the defendant.

Held, upon the principle that *nulla injuria est quae in volentem fit*, that the success of the stratagem cannot be relied upon by the plaintiff as a ground of action for an injury done to him.

Action for £500 damages for libel.

The declaration alleged that the plaintiff was by trade or profession a hotel-keeper and at present resided at Wynberg in the Cape District.

That the defendant was a hotel-keeper and also resided at Wynberg. During the month of October, in the year 1892, the defendant wrongfully, maliciously, and falsely published to one Albert Hacker, of Claremont, and to divers other persons the following letter :

Masonic Hotel,
Graham's Town
11th January, 1891.

Private and Confidential.]

Dear Sir,

In reply to your letter as to the character of Bennett, he was with me six months, and is a really first-class barman and cook, but I discharged him under very strong suspicion of dishonesty.

I am, Sir,
Yours Faithfully,
George Powling.

The defendant wrongfully and maliciously, and with intent to damage the plaintiff in his calling, represented to the said persons that the said letter referred to the plaintiff.

During the month of October, 1892, the defendant wrongfully, maliciously, and falsely uttered and spoke to divers persons, and more especially to Albert Hacker, of Claremont, and to one Chapman

of and concerning the plaintiff the following defamatory words: *Bennett* (meaning the plaintiff) *is a rogue, thief, and a liar*.

By reason of the premises the plaintiff has sustained damages to the amount of £500 sterling.

The plaintiff claimed :

- (a) £500 damages.
- (b) Further relief.
- (c) Costs of suit.

The defendant's plea denied generally the allegations in the declaration, except that it admitted the publication of the letter to Hacker.

The defendant also claimed in reconvention the sum of £100 damages for slander, but this claim was subsequently withdrawn.

The replication was general and issue was joined on these pleadings.

Mr. Webber appeared for the plaintiff and Mr. Graham for the defendant.

John Thomas Bennett, the plaintiff, deposed that he was an hotelkeeper carrying on business in Wynberg. He came out to the Colony about thirteen years ago as *chef* to the Provincial Hospital in Port Elizabeth. Subsequently he came to Wynberg. He had a quarrel some time ago with the defendant about some property. In October, 1892, he had a letter from him enclosing copy of a letter which he had left in a pocket-book in a cupboard in the Royal Hotel, Wynberg. He had left it there by mistake. The pocket-book contained his name. The letter was written by one Powling, of Graham's Town, a former employer of his, and was addressed to one Brown, a friend of his. The letter was libellous.

By Mr. Graham : He wanted to know what kind of a character Mr. Powling would give, so he got his friend Brown to write to him on the subject, and the lost letter, of which he received a copy from defendant, was the reply. He denied that he had quarrelled with Morris. He never accused defendant of stealing his ducks. He did not call defendant opprobrious names. He called him a "little joker." He had never spoken offensively of him to other people. He sought to get the strongest evidence in this case, but he did not offer a man, named Pote, £25 to go down to Wynberg and trap Morris to slander him (plaintiff). He said that if Pote spent any money for liquor he would repay him. He had not a worse temper than other people, but he prided himself on his candour in telling people what he thought of them; but he had not told his opinion candidly to people about Morris. He had a slanging match with defendant in the latter's bar on one occasion. It was merely a friendly quarrel, and they drank afterwards and parted. He worked up hotels for other people to spoil. He did not refer in that to defendant, who now had the Royal Hotel.

By the Court : He had suffered severe damage

in the eyes of his friends and the public of Wynberg by reason of this libel. Everybody knew it.

The Chief Justice : But the public generally do not know it ?—Everybody in Wynberg knows it.

The Chief Justice : I live in Wynberg, and I never heard it.—It wouldn't come to you, my lord.

By Mr. Graham : He did not object to the letter, but to what defendant called him afterwards. He merely kept the letter as a curio.

The Chief Justice : You took very little care of it as a curio.

Plaintiff : One is bound to leave something behind when moving in a hurry.

The Chief Justice : But he takes his curios.

Re-examined : I don't object to the letter, because that was not true. I object to his calling me a rogue, a thief, and a liar.

The Chief Justice : But that is not true either ?

Plaintiff : I came here to disprove it.

Mr. Graham : I am afraid we cannot assist you in that.

He asked Pote to go down to defendant's and take a witness with him, because he found a difficulty in getting witnesses, to see if Morris would say anything to him. The letter was the subject of conversation with men who frequented bars in Wynberg.

Albert Hacker deposed that in October, 1892, he was in the employment of the defendant, who showed him the pocket-book and letter, and asked him what he thought of it. Defendant said he would send a copy of it to Bennett, and witness said he had better be careful. Defendant said he did not think it would be any harm.

Cross-examined by Mr. Graham : At the time he was defendant's foreman and barman the pocket-book was found in one of the pigeon-holes in the office. The plaintiff and defendant had been on bad terms for a considerable time, and said abusive things of each other. Plaintiff told him he would lose nothing by giving evidence. He would not say, however, that Bennett wanted him to get Morris to slander him (Bennett). When Morris said he would send the copy of the letter he said it might stop Bennett's mouth.

By Mr. Webber : He never heard Morris call Bennett a thief. He called him a rogue and a liar.

By the Court : Plaintiff and defendant were equally bad in the matter of abusing each other. He was on good terms with both.

Alexander Press, foreman baker, deposed that at the bar of the Royal Hotel defendant took the letter from a pocket-book, and read it to him.

Cross-examined by Mr. Graham : He did not tell Morris that Bennett had been calling him all sorts of names. He was working for Mr. Bennett

at the time, and had heard about the letter the night before from him.

By the Court: It was not on Bennett's suggestion that he spoke to Morris.

Frederick Morris, Royal Hotel, Wynberg, the defendant, deposed that he knew Bennett for three years, and had been on bad terms with him for some time. They first quarrelled about an account when plaintiff's wife stayed some days at defendant's hotel; they next quarrelled about the Hout's Bay property, and subsequently plaintiff threatened to pull his nose in his own bar. He heard frequently that plaintiff had been using bad language about him. He was two years in the Royal Hotel before he found the pocket-book. He found it when he was making some alterations in the bar fittings. Hacker was in the bar at the time, and he showed him the letter. Press had been coming down to his place for days slandering Bennett and telling defendant what Bennett was saying about him. It was under these circumstances that he showed Press the letter.

Cross-examined by Mr. Webber: He was not supposed to know that the pocket-book was Mr. Bennett's. The letter was marked "private and confidential," but it was addressed to Mr. Bennett.

John Pote deposed that on December 2 he paid defendant an account of £25. He said a letter had been sent to him from Morris, and said he wanted to get a case against him. He asked witness to go down to Morris's, stand him drinks, and get him to shew the letter. Plaintiff said he would pay for the drinks, and if he got £500 damages he would give witness £25. Defendant was from home. Bennett used strong language respecting Morris.

Mr. Webber was heard for the plaintiff, and Mr. Graham for the defendant.

The Chief Justice said: This is a somewhat extraordinary case. The plaintiff, as far back as 1881, was told that the proprietor of the Masonic Hotel, Graham's Town, was in the habit of slandering him, and in order to entrap him into a repetition of the slander, requested one Brown to write to Graham's Town for the plaintiff's character. In answer to this letter the hotel proprietor at Graham's Town wrote a letter marked "private and confidential" to Brown, who delivered it to the plaintiff, and it is in this letter that the defamatory words alleged to have been published by the defendant occur. The plaintiff kept this letter without taking any proceedings against the writer. He owned the Royal Hotel, Wynberg, and afterwards sold the business to the defendant. On quitting this hotel he seems to have left the letter behind a desk in the bar of the hotel and to have forgotten all about it until last year, when the defendant found it. Acting on the impulse of the moment and with the

object, as it appears to me, of discovering how the letter came to be there, the defendant at once showed the letter with its contents to his barman, who was a confidential servant of his. The first question arising in this case is whether the publication of the defamatory matter to the barman, under the special circumstances of the case, renders the defendant liable in damages for defamation. Subsequently the plaintiff informed a servant of his, named Press, of the contents of the letter with the object, as clearly appears to me, of inducing Press, who was a customer of the defendant, to use this information as a means of entrapping him into communicating its contents to Press. The stratagem was successful, and the second question to be decided is whether the plaintiff is entitled to damages for his success in extracting a publication of the defamatory matter from the defendant. In deciding these questions it is essential to bear in mind that, by the civil law, differing in this respect, as pointed out by *Folkard*, from the English law, the ground upon which the action for defamation rests is the *injuria*, the personal insult or contumely to which the plaintiff has been exposed. No action lies for such injury, as such, unless the defendant was actuated by the *animus injuriandi*. Consequently as was remarked in the case of *Botha v. Brink* (8 Buch, 180), "the rule of the Roman Dutch law differs, if at all, from that of the English law in allowing greater latitude in disproving malice. Under both systems the mere use of defamatory words affords presumptive proof of malice, but under our law, as I understand it, the presumption may be rebutted, not only by the fact that the communication was a privileged one—in which case express malice must be proved—but by such other circumstances (examples of which are given in *Vet* 47, 10, 20) as satisfy the Court that the *animus injuriandi* did not exist." In the subsequent case of *Dippenaar v. Hauman* (8 Buch, 185), privilege alone was relied upon, and no other circumstances were indicated to disprove malice. All the circumstances of the present case satisfy me that, even if the occasion on which the defendant showed the letter to the barman was not in strictness a privileged one, he was not actuated by any *animus injuriandi*. He was surprised to find such a letter behind the desk, and, on the impulse of the moment, he showed it and communicated its contents to the barman. It was the most natural thing in the world for him to do, the most inoffensive person would do the same thing, for aught he knew the letter might not have been a genuine one, and he would of course wish to know from the barman how the letter came to be there. I am of opinion, therefore, that the plaintiff must fail upon the first count. As to the second count, the defendant was entrapped into communicating

the contents of the letter to Press, to whom the plaintiff himself had already communicated them. I am not aware of any authority directly bearing on such a case, and, in the absence of any decision in point in any South African Court, I would apply the rule laid down by *Ulpian* (Dig. 47, 10, 1, section 5), *Nulla injuria est quae in volentem fit*. This rule has been adopted as a maxim of the English law in the form *Volenti non fit injuria* without any acknowledgment, as far as I can ascertain, of its true origin. The illustration of the rule given by *Ulpian* is that of a son sold as a slave with his consent. *Ulpian* holds that the father may bring an action in his own name against the seller for the injury but not in the name of the son, he being a consenting party. *Voet* (47, 10, 4) applies the rule to every class of injuries, including verbal injuries. To relieve a defendant the evidence of the plaintiff's willingness must of course be clear and conclusive.

For instance, a person who has been libelled in a newspaper employs another to buy a copy merely to prove publication. The purchase of the newspaper is free to all, and the person employed has the means of becoming acquainted with the defamatory matter without being employed at all. Moreover, it does not follow that because he is so employed he must read the whole paper and so become acquainted with the terms of the libel. The mere fact of such employment therefore would not prove the willingness of the employer to be defamed. But it is different where he himself communicates the contents of a defamatory document to his agent with the view of such agent using the information as a means of extracting a repetition of the contents from the person in possession of the document. The success of his stratagem places his character in no worse light than it was in before, and being exactly what he had planned and wished for, cannot be relied upon as a ground of action for an injury done to him. On both counts, therefore, the judgment of the Court must be for defendant with costs.

Their lordships concurred.

[Plaintiff's Attorneys, C. & J. Buissonné ;
Defendant's Attorney, J. Hamilton Walker.]

CARR V. LA GRANGE. { 1898.
Sept. 1st.

Promissory note—Non-presentation—Exception—Magistrate's decision reversed on appeal.

This was an appeal from a judgment of the Assistant Resident Magistrate of Prince Albert, in an action in which the present appellant sued the

respondent for £87 10s., due on a promissory note made by the defendant in favour of the plaintiff, dated and made payable at Worcester, where the plaintiff resides, the defendant residing at Prince Albert. At the date of the action the plaintiff was still the holder of the note.

The defendant excepted to the proceedings, inasmuch as no notarial presentation of the note had been made.

The Magistrate sustained the exception, relying, as he stated in his reasons, on *Van der Linden* and on Act 20 of 1866, section 9, and dismissed the case with costs.

The plaintiff now appealed.

Mr. Rose-Innes, Q.C., was heard in support of the appeal, and contended that notarial presentation was unnecessary, the note being in the hands of the payee and being general in its terms, "payable at Worcester." He cited *Verwey v. O'Reilly* (2 Searle, 190) as being directly in point.

There was no appearance for the respondent.

The Court allowed the appeal.

The Chief Justice: It is clear in this case that the Magistrate made a mistake. The action was brought by the payee against the maker of the note, and there was no special place specified in the note at which payment was to be made; it was stated generally "at Worcester." The appeal against the judgment allowing the exception must be allowed with costs, and the case remitted to the Magistrate's Court to be decided on its merits.

Their lordships concurred.

[Appellant's Attorney, O. O. Silberbauer.]

REGINA V. MEZA. { 1898.
Sept. 1st.

Theft—Evidence of accomplices—Admissions
Conviction sustained on appeal.

This was an appeal from a conviction of the appellant by the Resident Magistrate for Graham's Town.

The prisoner was charged with the crime of theft of cattle, in that upon the 8th day of October, 1891, and at Manley's Flat, in the district of Albany, the said Mesa did wrongfully and unlawfully steal one cow, the property of John Hodgkinson, a farmer, or otherwise of receiving portions of the carcass of the said cow, well knowing it to have been stolen.

The prisoner pleaded not guilty.

At the trial the prisoner's two accomplices, who were convicted shortly after the theft, and who had undergone their punishment of nine months' hard labour, swore that it was the prisoner who had stolen and killed the cow. Their evidence was, however, contradictory.

The owner's herd deposed that he had charged the prisoner with stealing the cow, that the prisoner admitted the theft and gave two oxen in payment.

There was also evidence to show that after the theft the prisoner ran away, leaving his wives, children, and cattle behind him, and that after an absence of eighteen months he returned and gave himself up. It also appeared that he offered to give two head of cattle for the lost cow.

The prisoner was found guilty on both counts and sentenced to nine months' imprisonment with hard labour. The following were the Magistrate's reasons:

The Court holds that the evidence is sufficient to convict. The evidence of two accomplices is given. Then there is the evidence of a cow having been stolen and the damning fact that the accused, who was a man holding property and having crops, ran away immediately he hears inquiry being made for the lost cow. He, after an absence of eighteen months, returns, and only then, finding that there is a warrant out for him and every probability of capture, does he surrender. The fact that he has surrendered is taken into consideration in passing sentence.

The prisoner now appealed.

Mr. Tredgold was heard in support of the appeal. He dwelt on the contradictory nature of the evidence given by the accomplices, and contended that no jury would have convicted on such evidence. He cited *Regina v. De Kock* (1 Ros., 401) and *Regina v. Diedrick* (8 H.O.R., 859).

Mr. Giddy, for the Crown, was not called upon.

The Court sustained the conviction and dismissed the appeal.

The Chief Justice said: If the conviction in this case depended upon the evidence of the accomplices or upon the mere fact that the cow was lost, the Court would not support it, because the two accomplices do not entirely agree as to what took place at the time of the theft, though that may be owing to the fact that two years elapsed from the time of the cows being stolen till the time the witnesses gave evidence. Still the discrepancies in the evidence would cause great suspicion as to whether the accused was guilty of the crime, were it not that so many other circumstances point to his being guilty; not only the loss of the cow, but the fact that when inquiry was made he ran away leaving his cattle and wives behind him. The only allegation in his favour is, that after an absence of eighteen months he surrendered himself; but as is pointed out by the Magistrate, he only surrendered, himself when he knew that there was a warrant issued against him. The Magistrate bore in mind the fact that he had surrendered himself in passing

sentence. He clearly admitted to some of the witnesses that he was guilty of the theft, and there could be no stronger admission than the fact that he was willing to give two head of cattle for the cow that was lost. We consider there was ample evidence to convince any magistrate or jury, and the appeal must therefore be dismissed and the conviction sustained.

Their lordships concurred.

[Appellant's Attorney, H. P. du Preez.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.O.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.O.M.G.]

LONDON AND SOUTH AFRICAN EX- } 1898.
PLORATION COMPANY V. DE } Sept. 4th.
BEERS CONSOLIDATED MINES.

The Chief Justice said the Registrar of the Court had received a telegram from Captain Quintrall, saying that he had examined 161 loads of ground, and in that had found three diamonds, weighing five-eighths of a carat. He wanted to know if he should come down immediately for the case on Wednesday.

Mr. Innes said he had no instructions. If his learned friend thought five-eighths of a carat in 161 loads constituted diamondiferous ground he should be satisfied to have the case tried on Wednesday.

Mr. Searle said he understood the hearing was absolutely fixed for Wednesday.

HAMBLY V. SOEKER BROS. } 1898.
 } Sept. 4th.

Negligence—Contributory negligence—
Damages for injury.

In an action for damages for injuries sustained by the plaintiff by reason of the upsetting of a vehicle hired from the defendants, it appeared that the plaintiff had immediately before the accident given the driver some beer, notwithstanding the defendants' previous warning that no liquor should be given to the driver, and that the drinking of the beer made him less careful than he would otherwise have been.

Held, that the plaintiff having himself contributed to the accident was not entitled to recover.

This was an appeal from a decision of the late Resident Magistrate for Cape Town in an action in which the present appellant (plaintiff in the Court below) sued the respondents for £20 damages.

The summons alleged *inter alia* :

1. That the plaintiff was a compositor and resided at Cape Town, and that the defendants were livery-stable keepers, residing and carrying on business in Cape Town.

2. That on Easter Monday, the 8rd April, 1898, the defendants covenanted and agreed to supply the plaintiff and divers other persons with a wagonette drawn by four horses to convey him (the plaintiff) and others to Hout's Bay from Cape Town and back again for valuable consideration.

3. That the said defendants did supply the horses and vehicle as aforesaid on the day in question, the same being under the control and in charge of a driver supplied by, and in the service of the defendants.

4. That while *en route* to Hout's Bay as aforesaid, through the negligence, carelessness, and incapacity, or one or other of these causes, of the defendant's servant or of the defendants themselves, the vehicle was capsize and the plaintiff, with others, was thrown violently to the ground and sustained serious loss and injury, amounting to £20, which the defendants neglected and refused to pay. The plaintiff claimed £20 damages and costs of suit.

The defendants pleaded a general denial of the debt. The plaintiff's evidence went to show that the accident, which took place at 9.20 a.m. on the 8rd April, was due to the careless driving of the defendant's servant in lashing the horses as they were descending the Wynberg side of Hout's Bay Nek, in consequence of which the wagonette was upset and the occupants thrown out. There was also evidence showing that there was no brake on the wagonette, and the plaintiff and the witnesses asserted that the only liquor which was given to the driver was about quarter of a bottle of Cape beer.

The defence was contributory negligence on the part of the plaintiff in giving the driver liquor. One of the defendants swore that he told the plaintiff not to give the driver anything to drink, and the driver himself deposed to his having drunk nearly a bottle of beer, which was given to him by the plaintiff or his friends. It was also proved that the driver was arrested for being drunk about five p.m. on the same day, but some seven or eight hours after the accident.

The Magistrate dismissed the case with costs.

No reasons were, however, given for the judgment. The plaintiff now appealed.

Mr. Searle, for the respondents, objected to the appeal being heard at all, on the grounds that the case was decided in April last and the appeal had not been prosecuted since. He referred, to the general principles laid down in *Rymer v. Solomon* (2 Sheil, 350), and contended that unless some special circumstances could be shown in the present case accounting for the delay, the appeal should not be heard.

The Chief Justice pointed out that in *Rymer v. Solomon* a special application had been made to the Court for an order debarring the respondent from prosecuting his appeal, because of his unreasonable delay. No such application had been made in the present case, and as the appeal had been set down, it should be heard on its merits.

Mr. Rose-Innes, Q.C., was then heard in support of the appeal, and contended that the evidence showed negligence on the part of the defendants' servant, who had whipped the horses unnecessarily in coming down hill. There was no contributory negligence on the part of the plaintiff, as only a small portion of a bottle of tiskey beer had been given to the driver.

Mr. Searle, for the defendant, pointed out that Soeker had warned the plaintiff not to give drink to the driver. The evidence of the driver was that they had given him drink. He argued that plaintiff had been contributory to the accident by giving liquor to the driver.

The Court dismissed the appeal.

The Chief Justice said: It is unfortunate that owing to the death of the able Magistrate who decided this case, we have not the benefit of the reasons for his judgment. It is certain that the accident was occasioned by the negligence of the defendants' servant who had charge of the wagonette and horses. As they were going downhill on a steep portion of the road, where he must have known that the horses would not be easily manageable, he cracked his whip and sent the horses going at full speed. There was the less excuse for this conduct seeing that the wagonette was not provided with a brake. In consequence of the swaying to and fro of the vehicle it was overthrown with the plaintiff and a good number of other passengers in it, and if there had been no contributory negligence on the plaintiff's part I would have had no difficulty in reversing the judgment below. The real question therefore is whether the plaintiff, by his own conduct, contributed to the occurring of the accident from which he has sustained certain injuries. I am satisfied that he had been warned by the defendant not to give the driver any spirituous liquor on the journey. In spite of this warning he gave the driver some beer, very little according to his own

account, but according to the driver's evidence nearly a bottle full. The Magistrate must have believed the driver's evidence. Whether he took much or little the effect of the beer was certainly to make the driver less careful at a part of the road where the greatest skill and care were required. After the warning given by the defendant it is impossible to hold that the plaintiff's own negligence did not contribute to the accident, and that being so, the appeal must be dismissed with costs.

Their lordships concurred.

[Appellant's Attorney, J. Hamilton Walker;
Respondents' Attorney, D. Tennant, jun.]

STEYN'S TRUSTEE V. STEYN. { 1893.
Sept. 4th
& 11th.

Attachment—Horse—Ordinance 6 of 1843,
section 76—Warrant—Action for damages.

This was an appeal from a judgment of the Assistant Resident Magistrate for Albert in an action heard on 18th July last in which the present respondent (plaintiff in the Court below) sued the appellant in his individual capacity, and as sole trustee of the insolvent estate of J. L. Steyn (plaintiff's father), for the sum of £20.

The summons alleged *inter alia* :

1. That on or about the 22nd day of March, 1898, the defendant under colour of a certain warrant, bearing date the 22nd day of March, 1898, issued under the provisions of section 76 of Ordinance 6 of 1843, did wrongfully and unlawfully seize and attach, or caused to be seized and attached, a certain horse called Champion, the lawful property and in the lawful possession of the plaintiff, and the said defendant has since that date deprived, or caused to be deprived, the plaintiff of the said horse, and of the use and possession thereof.

2. That before the said seizure and attachment the said defendant had due notice that the said horse was the property of the plaintiff, which notice the defendant disregarded.

3. That at the time of the said seizure the said horse was entered by the plaintiff to run in the Burghersdorp races on the said 22nd March, 1898, and the plaintiff had been put to considerable trouble and expense in preparing and training and entering the said horse for the said races, and in consequence of the said attachment was prevented from running at the said race meeting.

By reason of the wrongful acts of the defendant aforesaid the plaintiff has sustained damage in the

sum of £20 sterling, which sum the defendant neglects and refuses to pay.

The plaintiff prayed for judgment for the sum of £20 and costs.

The defendant's attorney excepted to the summons on the grounds that the defendant was prejudiced in his defence, inasmuch as he was sued in his representative and private capacity, and that the summons should have stated clearly in what capacity the defendant had to defend his wrongful and unlawful acts. (*Van Zyl's Theory of Judicial Practice*, p. 26.)

The plaintiff's attorney then applied for an amendment of the summons, and to have the words "in his individual capacity" struck out.

The amendment was allowed and the exception overruled.

The defendant then tendered evidence in support of his exception that he was prejudiced in his defence. The exception having been overruled evidence on the question of prejudice was not heard.

The defendant then pleaded :

1. The general issue.
2. That he acted *bona fide* in his official capacity, and in the interest of the creditors.

On the same day that the case was heard, judgment was given for the plaintiff in another case which he brought against Dr. Shaw for delivery of the horse Champion, or its value, Dr. Shaw having purchased the horse at a sale held by the trustee in the insolvent estate of J. L. Steyn (the plaintiff's father).

The plaintiff's case was that Champion was his property, having been given to him by his father for a horse called Trust-Me-Not, which the latter had neglected to buy in a selling race.

The plaintiff admitted, however, that Champion was used in his father's business in consideration of his paying for part of the horse's keep.

The defendant's case was that Champion was really the property of the plaintiff's father (the insolvent). The Magistrate gave judgment in favour of the plaintiff for £15, the amount of the expenses to which he had been put in connection with the training, feeding, and entry of Champion for the Burghersdorp races, and held that the ownership of the horse had been clearly established in the case of *Steyn v. Shaw* referred to above.

From this judgment the defendant now appealed. Mr. Rose-Innes, Q.C., was heard in support of the appeal.

Mr. Graham for the respondent.

Judgment was postponed and the Resident Magistrate directed to forward the record in *Steyn v. Shaw*.

Afterwards, on 11th September, the Court delivered judgment

The Chief Justice said : This was an action

brought before the Magistrate's Court at Burgersdorp for damages alleged to have been sustained by the plaintiff by reason of the defendant the trustee of the insolvent estate of plaintiff's father taking possession of a horse called Champion alleged to be the property of the plaintiff. The main question which had to be determined by the Magistrate was the ownership of this horse, but very little evidence as to such ownership was given, and so far as it went the evidence certainly was not in favour of the plaintiff. It appeared, however, that the Magistrate based his judgment mainly on the fact that there had been a previous case in which the same plaintiff had brought an action against one Shaw, to whom the horse had been sold by the trustee, and the plaintiff was successful in that action, and thereupon the Magistrate seems to have held that that action was conclusive in the present case. If the trustee had been a party to that case, or if he had consented to the evidence in that action being used in the present action, there can be no doubt the decision in that case would have been binding upon him. But there is nothing to show that he consented to such evidence being used or that the defendant was a party to the action. Under the circumstances, I think the Magistrate ought to have dismissed from his mind altogether the fact that the plaintiff had been successful in the previous action. In order, however, that no injustice should be done to the plaintiff, the Court desired that the evidence in the case against Shaw should be sent for in order that we might carefully read it, and see if it were perfectly clear that the horse did belong to the plaintiff. We have read the evidence, and we find that the most that can be said for the plaintiff is that it is extremely doubtful to whom the horse does belong. If I had to decide the case my inclination would be to hold that the horse did not belong to him. The very first witness called for him said the horse did not belong to him, that Champion was net given in exchange for Trust-Me-Not, but that a promissory note was given for the latter horse. Therefore, the evidence in that case being so doubtful, and as the evidence in the present case leaves it extremely doubtful also whether the horse does belong to plaintiff, the Court is of opinion that the proper judgment should have been absolution from the instance. The appeal will therefore be allowed, and the judgment altered into absolution from the instance, with costs in this Court and in the Court below. I forgot to state that the plaintiff, according to the evidence, is a boy eighteen years old, and the horse appears to have been used all along by his father in his business as a butcher.

Their lordships concurred.

[Appellant's Attorney, G. Montgomery Walker;
Respondent's Attorneys, Messrs Fairbridge &
Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.O.M.G.]

Ex parte HONEY. In re HOWARTH & SONS V. WEST. 1898.
{ Sept. 5th.

Attachment—Unsatisfied judgment—Process
in aid—Act 39 of 1877, section 15.

This was the petition of William Streak Honey, an attorney of the Supreme Court and the High Court of Griqualand. The petition set forth that James Howarth & Sons are merchants and manufacturers, carrying on business at Sheffield, England; that James Howarth & Sons on the 21st November last appointed the petitioner their attorney and agent for them, and on their behalf to institute proceedings against one James West, who was at that time residing in Kimberley, and who is at present residing in Koffyfontein, in the Orange Free State.

A summons was issued against West, calling upon him within two days of the service thereof to enter appearance to answer James Howarth & Sons in an action wherein they claimed:

The sum of £1,841 4s. 5d., balance of account, together with interest and costs.

On the 15th July, 1898, judgment was given in favour of James Howarth for the amount claimed with costs.

The taxed costs amounted to £24 18s. 5d.

On the 27th July last, a writ of execution was issued, and thereafter the sum of £489 4s. 11½d. was paid to the petitioner, being the amount realised less the Sheriff's expenses. West is still indebted to James Howarth & Sons in the sum of £876 17s. 10½d., together with interest.

The petitioner alleged that West had informed him on several occasions after the issue of the summons that there were lying at Port Elizabeth certain goods his property. The petitioner prayed for process of execution upon the judgment of the High Court in respect of the part remaining unsatisfied, in terms of section 15 of Act 39 of

1877, against the movable property of West situate elsewhere in the Colony than Griqualand West.

Mr. Graham was heard in support of the application.

The Court granted the order as prayed.

Ex parte SMITH. Re THE MINOR { 1898.
TAYLOR. { Sept. 5th.

Mr. Searle appeared for the petitioner and moved for an order authorising the Master of the Supreme Court to pay out to the petitioner, the minor's tutor dative, the amount of inheritance, £89 14s. 10d., devolving upon her out of her mother's estate.

The minor is at present an inmate of St. Peter's Home, Graham's Town (Industrial branch), the expense of her maintenance and education being defrayed by charitable contributions and the interest on the share of her inheritance in the hands of the Master.

It was proposed to transfer the minor, whose father was in a good position during life, but died in needy circumstances, from the industrial branch of St. Peter's Home to the higher or boarding branch to enable her to qualify herself for a position superior to that of a domestic servant.

No funds being available, except the inheritance above referred to, the present application was made.

The matter was referred to the Master, who reported strongly in favour of the petition.

The Court granted the order in terms of the Master's report.

In re ALBERT DISTRICT GOLD-MINING COMPANY.

Mr. Searle presented the third report of the liquidators of the above company.

An order was made that the report lie for inspection for the usual period.

SEARLE AND GILBERT AND SULLIVAN V. BONAMICI AND PERKINS.

Mr. Rose-Innes, Q.C., applied for an order requiring the respondents to pay into the hands of the Sheriff 10 per cent. of the gross proceeds derived by them from each performance in Cape Town of operas of which applicants hold the copyright, pending the result of an action for damages.

The respondents filed a consent.

The order was granted, costs to be costs in the cause.

LOXTON V. THE MAYOR AND COUN- { 1898.
CILLORS OF QUEEN'S TOWN. { Sept. 5th
& 11th.

Encroachment—Public street—Trespass.

This was an appeal from a judgment of the Hon. Mr. Justice Jones in an action brought in the Circuit Court for the district of Queen's Town, held on the 8th and 9th April last, in which the present respondents (plaintiffs in the Court below) sued the appellant for encroachment on one of the Queen's Town streets.

The declaration was in the following terms:

1. The plaintiffs are the Mayor, Councillors, and townsmen of Queen's Town, and are a body corporate constituted under Act 89 of 1879, and are the proper parties to sue in this action.

2. The defendant is an agent residing at Queen's Town.

3. The property in the public streets within the Municipality of Queen's Town and amongst others in Cathcart-road, which is a street within the said Municipality, is by Act 89 of 1879 vested in the plaintiffs.

4. The defendant is the owner of certain two erven or lots of ground, which are situate alongside of and abut upon the said Cathcart-road, to wit, lots 65 and 66.

5. In or about the year 1888 the defendant wrongfully and unlawfully entered and trespassed upon the said public street of Cathcart-road, and erected or caused to be erected four verandahs or parts of verandahs upon the same in front of the said lots 65 and 66.

6. The plaintiffs thereupon forthwith gave the defendant notice protesting against the erections of the said verandahs in so far as they encroached upon the said street, and giving him notice that legal steps would be taken for their removal.

7. Notwithstanding the said notice, the defendant wholly failed to remove the said verandahs, and has continued, and still continues to trespass, upon the said public street by means of the same.

8. The defendant, though frequently requested to remove the said verandahs from the said public street, has refused and neglected, and still refuses and neglects so to do.

Wherefore the plaintiffs pray:

(a) That the defendant may be compelled to remove the said verandahs from the said public street.

(b) General relief.

(c) Costs of suit.

The following plea was filed:

1. The defendant admits paragraphs 1, 2, 3, and 4 of the plaintiffs' declaration, but denies the remaining paragraphs thereof.

2. The defendant specially denies that he has in any way trespassed on the said Cathcart-road, and

says that the verandahs complained of have been erected on ground forming no part of the said road but the private property of himself.

8. The said ground on which the verandahs are erected does not fall within the boundaries of the said Cathcart-road, which have been recognised and adopted by the plaintiffs, their predecessors in office, and the public generally for upwards of thirty years, and beyond the period of prescription.

4. Further, the defendant and his predecessors in title have been in possession of the said ground for upwards of thirty years, and for the full period of prescription, and thereby the defendant has acquired a right to the said ground.

Wherefore the defendant prays that the plaintiffs' claim may be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

At the trial, after evidence at considerable length had been given to show that the plea of prescription was contrary to fact, that plea was withdrawn.

At the hearing of the case, twenty witnesses were examined, six of whom were Government land surveyors, four of them being of opinion that the defendant had encroached upon Cathcart-road, and two of them taking an opposite view.

The learned judge inspected the *locus in quo*, and gave judgment for the plaintiffs with costs. The Court holding that the line on the ground described by the line A B on the plan No. 1 (put in) was the correct line forming the boundary of Cathcart-road and the defendant's property.

The defendant was ordered to remove those portions of his buildings which projected over this line into the street.

From this judgment the defendant now appealed.

Mr. Rose-Innes, Q.C. (with him Mr. Webber) was heard in support of the appeal, and relied mainly on Mr. Surveyor Murray's evidence which went to show that there had only been an encroachment by the defendant of 1½ inches at the extreme end of the verandah of house No. 1.

Mr. Searle (with him Mr. Graham) for the respondents.

The Court dismissed the appeal.

The Chief Justice said: Since the adjournment we have carefully read the evidence in this case and the reasons of the learned judge for his judgment, and we have come to the conclusion that the appeal ought to be dismissed. The case for the appellant has been very ably argued, but the arguments adduced have not been sufficient to do away with the very strong arguments in favour of the judgment which are embodied in the reasons. The argument for the appellant is really based upon two assumptions, the first being that the pegs upon which the defendant's surveyor relied are perfectly correct,

and in the second place, that the erven on the eastern side of Cathcart-road were laid out by the surveyors with strict mathematical accuracy, which was further observed in relation to the pegs in the Hexagon, and to the west of the Hexagon. But neither of these assumptions is borne out by the evidence. One of the pegs, which is admitted on behalf of the appellant to be a correct one, is Southey's peg in Cathcart-road. This is the nearest peg to the defendant's erven about which there is the dispute. Now, if that peg is correct, then the defendant is wrong in claiming a boundary to the full extent of the verandah. Looking at the erven in that street, it is quite clear that if this contention be correct then he has really more ground than ever was intended to be given. There are some houses and stables to the south of these erven which would be cut out altogether if this property extends four feet further into the street. It is clear that if the appellant's contention be correct it would throw out two other streets running parallel with Cathcart-road, namely, Owen-street and Ebden-street, because it is admitted that these erven should be 180 feet in depth, and the two together being 360 feet, both Owen-street and Ebden-street would have to be shifted in order to make them agree with the defendant's contention. I need not add anything further to the remarks made by the learned judge in his reasons. Although something might be said for the defendant, upon the whole the arguments in favour of the plaintiffs are the correct ones, and the judgment of the learned judge ought to be sustained. The appeal must, therefore, be dismissed with costs.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Fairbridge & Arderne; Respondents' Attorneys, Messrs. Scanlon & Sytret.]

LONDON AND SOUTH AFRICAN EX-
PLORATION COMPANY V. DE
BEERS CONSOLIDATED MINES, } 1898.
LIMITED. } Sept. 6th.

Lessor and lessee — Diamond mine —
Diamondiferous ground—Right of pro-
specting — Appointment of "viewer" —
Surrender of land leased.

*By articles of agreement between the plain-
tiffs, as owners of certain land, and the
defendants as lessees of such land for the
purpose of being used as depositing floors
for their diamondiferous soil from an adjoining
mine, it was provided that should at any
time any portion of the ground leased be
proved to be diamondiferous, the lessees shall*

surrender such ground to the lessors, who shall there-upon grant an equal extent of other land for depositing floors and pay compensation.

Held (1) that, in the absence of any express reservation, the lessors had no right of prospecting for diamonds in the ground thus leased; (2) that upon production of prima-facie evidence that the ground leased is diamondiferous the Court may grant leave to make a full examination of the ground and appoint a "viewer" for the purpose; and (3) that if the ground is found to be diamondiferous and the lessees bona fide intend to work the ground as a diamond mine the lessees may be compelled to make the surrender even although upon the examination diamonds have not been found in such quantities as to make it certain that the mine would be payable.

This was an action instituted by the plaintiff company against the defendant company under the circumstances disclosed in the following paragraphs of the declaration:

3. The plaintiffs are the registered owners of the farm Dorstfontein, situated in Griqualand West, the title to which contains no reservation of precious stones in favour of the Crown.

4. Upon the said farm are situated a diamond mine called the Du Toit's Pan Mine, and certain depositing floors used in connection therewith.

5. Certain claims in the said mine are let by the plaintiffs to the defendants, and a certain area of ground upon the said farm has been allotted by the plaintiffs to the defendants for use as depositing-floors in connection with the claims so leased as aforesaid, upon the terms and conditions contained in certain articles of agreement, a copy whereof is hereunto annexed, marked "A," to which plaintiffs crave leave to refer.

6. Portion of the said area allotted as depositing-floors, containing in extent about 4,500 square feet, and more particularly described in the plan hereunto annexed, marked "B," has been discovered to be diamondiferous.

7. The plaintiffs are entitled under and by virtue of sub-section 2 of section 8 of the said articles of agreement to a surrender to them by the defendants of the defendants' interest in the said portion of diamondiferous ground, and have called upon the defendants to surrender their interest as aforesaid.

8. The plaintiffs are willing upon such surrender, and have tendered and hereby again tender, to

grant to the defendants an area of land for depositing ground equal to that surrendered, and are also willing, and have tendered and hereby again tender, to grant to the defendants such compensation for any works constructed by them upon the said ground as may be agreed upon by the parties or determined by arbitration, as provided by the said articles of agreement, but the defendants have refused and still refuse to surrender their interest in the said ground.

9. On or about July the 14th, 1893, and after the said portion of ground was discovered to be diamondiferous, the defendants wrongfully and unlawfully filled up and fenced off a certain well that had for many years existed upon the said portion of ground, the said well was so dealt with by the defendants, not in the course of mining operations, but with intent to injure the plaintiffs in their property, and the plaintiffs have suffered damage thereby in the sum of £50.

The plaintiffs claim:

(a) A decree ordering defendants to surrender to the plaintiffs all the defendants' interest in the said portion of ground in the annexed plan referred to, containing 4,500 square feet or thereabouts, and to allow the plaintiffs a reasonable means of ingress and egress to and from the same; the plaintiffs tendering to grant to the defendants an extent of depositing-ground equal to that surrendered, and to pay such compensation, if any, as defendants may be entitled to under the annexed articles of agreement, the amount thereof to be determined as therein provided.

(b) The sum of £50 as damages for the filling up of the said well.

(c) Further relief.

(d) Costs of suit.

The defendants admitted paragraphs 1, 2, 3, 4 and 5 of the declaration, and denied the remaining paragraphs.

They further said that it was the duty of the plaintiffs, before calling upon them under the articles of agreement, to surrender the piece of ground alleged to be diamondiferous, to clearly define the limits and extent of the ground alleged to be diamondiferous, and to state to the defendants some grounds for such allegation, but this the plaintiffs neglected and refused to do.

The defendants further said that under the said articles of agreement the plaintiffs are bound to tender to the defendants an area of ground equal in extent to, and conveniently situate for mining purposes, as that which the plaintiffs have called upon the defendants surrender, but no at time have the plaintiffs tendered any such area of ground.

Wherefore they prayed that the plaintiffs' claim might be dismissed, with costs.

The defendants claimed, in reconvention, the sum of £50 damages for trespass.

The replication was general, and issue was joined on these pleadings.

The clause of the articles of agreement referred to in the pleadings was in the following terms : That should at any time any portion of any ground so given out as depositing-ground be discovered to be diamondiferous, the said lessees shall, as far as they are interested in such ground, surrender at the request of the lessors such diamondiferous ground to the said lessors, who shall thereupon grant to the said lessees an area of land for depositing-ground equal in extent to that surrendered, and shall further grant to the said lessees such compensation for any wells, sheds, buildings, overseers' or natives' houses, roads, or tramways constructed on such surrendered ground as may be agreed on between the parties, or in default of such agreement, as may be determined on by arbitration under the provisions of the Lands and Arbitrations Clauses Act, No. 6 of 1882.

Mr. Searle and Mr. Currey appeared for the plaintiffs, and Mr. Rose-Innes, Q.C., and Mr. Solomon, Q.C., for the defendants.

Mr. B. J. Currey, manager of the plaintiff company, deposed that the company entered into articles of agreement and lease with the defendant company. They were adopted in 1880, renewed in 1885, and again in 1890. At the date of the renewal in 1890 he was not aware that a diamond had been discovered in a well on the depositing-floors by Taylor. During the present year he became aware that an agreement had been entered into in London between the plaintiff company and Mr. Woolley on behalf of the Alice Syndicate, and he was instructed to put Mr. Woolley in possession of an area of twenty-five claims. As representing his company, he wrote to the De Beers Consolidated on July 10 pointing out the instructions he had received, and offering to surrender an equal quantity of ground to that claimed. He saw Taylor's affidavit before he wrote that letter. The defendants had not worked the Du Toit's Pan claims for two years or more. The well referred to in Taylor's affidavit was near the public road which ran through the depositing-floors. He had been for many years on the Fields, from 1872 to 1878, and from 1884 to the present time. The expression diamondiferous ground was well known in Kimberley, and in what was called yellow ground certain minerals were found. Yellow ground was recognised among diggers as ground producing diamonds; in fact it was blue ground decomposed. In it were found garnets, quartz, crystals, iron pyrites, green stone, carbon, &c. These were not found in the adjacent rocks at Kimberley. Diamonds were found in yellow ground unevenly and irregularly. At De Beers they were found in much greater quantities at a considerable depth than near the surface.

By the Court: I will not say as a rule they are found in larger numbers at a great depth. I was asked for an instance and I give De Beers.

By Mr. Searle: At one time the diggers there almost gave up in despair, and it was not till they got deeper they found diamonds to pay.

Cross-examined by Mr. Innes: On July 10 he wrote to the secretary of De Beers giving notice that portion of the depositing-ground had been found to be diamondiferous, and that he had authorised the representatives of the Alice Syndicate to take possession. Mr. Woolley brought him Taylor's affidavit before that. If the affidavit filed was dated the 21st August it was an earlier affidavit. He had not got that document; it was shown to him and then taken away. It contained the statement that Taylor had found a diamond in the well in 1874, and that was all he had before him as to the existence of diamondiferous ground. He had given the syndicate authority to enter upon 200 claims. He did not see the arrangement between the plaintiff company and the syndicate, but he was aware it had been made. He received a letter on the subject from London.

Mr. Innes called for the production of the letter. Notice had been served to produce all documents. They wanted to see whether there was an out-and-out agreement with the syndicate, and whether they were given a roving commission to get what they could and pay accordingly. Witness said he had some doubt as to whether he was justified in placing the defendants in possession of information relating to the business transactions of his company. As to the *bona fides* of the transaction, he could say that the money had been paid. He would send for the letter, and submit it to the Court.

Cross-examination continued: He did not know whether the Alice Syndicate was registered or not. It was composed of gentlemen from Cape Town and East London. They were Colonial people. When he said that yellow ground contained diamonds he was speaking of the matrix of the diamond. Yellow ground, constituted as he had described, contained diamonds.

By the Court: They had satisfied themselves as to the *bona-fide* intention of the syndicate to work these claims as a diamond-mine, and that was the understanding on which the arrangement was entered upon. The syndicate had paid a substantial sum, and were to pay a great deal more, and there was no question of receding from the bargain. Five claims were the extent of ground for which he had asked an inspection.

Andrew Forrest Brown deposed that he had been engaged in diamond-mining operations for eight years. He was one of the members of the Alice Syndicate, and went upon the disputed ground on

July 10. They found yellow ground mixed with lime. After the order of the Court, they sank a shaft 10 or 12 feet deep, about 150 feet from the well. They generally expected diamonds in ground where they found the deposit of minerals, garnets, pyrites, crystals, such as they found in the yellow ground. At the inspection last week, they cleared out the well to the water level, a depth of 25 feet, and sank a shaft 150 feet east of the well, both points being near the boundaries of the five claims. The shaft was 28 feet deep. In each they found yellow ground. They used two washing machines, worked by hand, and 161 loads of ground were washed. They washed for three days, Friday, Saturday, and a portion of Sunday. About 80 per cent. of the stuff taken out consisted of lumps, which were not treated. Three small diamonds (produced) were found weighing five-eighths of a carat, the largest being half a carat. They were handed over to the Inspector of Mines.

By the Court: These lumps were broken up when the ground was sufficiently valuable.

By Mr. Justice Buchanan: The three diamonds weighed about five-eighths of a carat.

Mr. Justice Upington: You would not like to work the claims upon that yield?—No, your lordship.

By Mr. Searle: Diamonds did not run uniformly in the Du Toit's Pan mine. In the extension claims a few days ago, 800 loads were washed, and only 4½ carats found; from the same quantity of ground they often got 50 carats.

In further examination, witness said the diamonds came out of the deposit from the well, from which there were more loads taken than from the shaft. They got yellow ground about 8 feet or 8 feet 6 inches from the surface.

Cross-examined by Mr. Solomon: He was aware when the agreement was made by the syndicate with the plaintiffs that not only was a diamond found in Taylor's well, but in other wells in the vicinity. On the strength of this they hired twenty-five claims, with the right to take up 175 more, provided they found that diamonds existed there. He entered the floors just before dark. The surveyor came at sundown to point out the claims, and they wanted to do some work at once to show they had taken possession of the ground. In the shaft they sunk then they went 8 or 4 feet into the virgin soil. They found no diamonds there, but had found the deposit which he described when they were turned off by De Beers.

By the Court: He judged by the nature of the ground that it was diamondiferous.

By Mr. Solomon: He would not be prepared to say that the test was satisfactory until 1,000 loads had been washed. If the result were the same as the test already made he was not prepared to say what he should do.

By the Chief Justice: It would be more satisfactory to go down to the blue.

By Mr. Searle: On the first occasion he was satisfied himself that there was yellow ground there. He was prosecuted before the Magistrate, and fined. This well is about 100 feet from the roadway.

By the Chief Justice: He was still trustee and one of the directors of the syndicate. After what he had seen he intended trying the ground further. He was not satisfied with the test, but he was satisfied that the ground was diamondiferous in the sense generally understood by that term.

By Mr. Justice Upington: They had ample capital for the development of the property.

James Mountser Taylor deposed that when sinking the well in the ground in dispute in 1874 he found a diamond weighing a carat and a half in the yellow ground. He gave the information in 1892 to Mr. Curtis. He was on the ground on July 10. Yellow ground was found in the well and the shaft. He corroborated the evidence of the last witness. Diamonds were not found regularly in Du Toit's Pan mine. It was the most patchy mine in Kimberley.

Adam Sedgwick Woolley, Kimberley, deposed that he entered into an arrangement with the plaintiff company to take up claims on the depositing-floors in dispute. There was no written agreement, merely a letter and reply. He put in the documents, receipts for money paid to plaintiffs, &c. They had paid £1,250, and were bound to pay a great deal more.

By Mr. Innes: He found the £250 paid in London. Captain Brown and his friends found £1,000 and other money to pay for working expenses. He knew of the diamond found in Taylor's well and in other wells in the neighbourhood. They could locate up to 200 claims. It might be called prospecting, but the word used was "locate."

Frank Starkey, surveyor to the plaintiff company, produced plans of the disputed ground.

For the defence,

Gardiner F. Williams, Kimberley, general manager of De Beers, deposed that he received from plaintiffs the letter of 10th July, and replied that it should be laid before the directors. He went to the ground on the morning of the 12th, and found six or seven Kafirs working there, with nobody in charge of them. He met Taylor, who said Mr. Woolley was in charge, and would be down in a short time. They had sunk a hole seven or eight feet deep about 120 feet from the well. The ground thrown up was simply lime and red sand. There was no yellow ground. It was not diamond-bearing ground in any sense that he understood the term. He told the boys to clear out, and ultimately took steps against Mr. Taylor

for trespass. He placed an officer in charge, and told him to arrest anybody trespassing. He had the holes filled up to leave the place in the same state it was in before. He told his people to fill up all the holes, and the well was filled up also. He did not go down to the inspection till it was all over. The ground looked like the yellow ground found around Kimberley, sometimes diamond bearing and sometimes not. Syndicates have been frequently formed in such cases, and ground rushed, but no diamonds found. In Germany last year he saw ground in which the twenty or thirty minerals they found associated with diamonds were also found, but no diamonds. It was a matter of importance to his company to have their depositing floors to themselves, and not have people prospecting over them. They could not say when the mine would be worked, and then these floors would be used for depositing and washing sites. No piece of the ground had been pointed out in the exchange.

Cross-examined by Mr. Searle: He was not at Kimberley when the De Beers mine was opened. Iron pyrites were not found in the blue ground, but garnets were. He was prepared to say that the stuff that came from the bottom of the shaft was red sand. He took some away, dried it, and carefully examined it. They wanted more proof that the ground was diamondiferous. All the holes were filled up according to the regulations. They should not have been open. It was not done to conceal the diamondiferous ground, nor would he say it was done in the interest of the public, if he had seen the well before the controversy, he would have given orders to close it.

By the Court: The expert informed him of the result of the examination. He did not understand exactly what was meant by diamondiferous, but if five-eighths of a carat in 161 loads was so he should say it was proved diamondiferous, but if it were necessary to have an appreciable quantity of diamonds to justify working, he should say it was not diamondiferous. He did not offer to give the five claims up to them, as he considered the matter was in the hands of the Court.

Captain Thomas Quintrall, called by the Court, gave evidence as to the sinking of the shaft, cleaning the well, washing the 161 loads, and finding the three diamonds. Forty-five loads were taken from the shaft and 116 from the well. At the eastern shaft there were 7 feet of debris, 8 feet 6 inches of red soil and lime, and then the yellow ground; at the well they found yellow ground at a depth of 7 feet 6 inches. That was what was generally called yellow ground in Kimberley, and contained the other minerals alluded to by the witnesses.

Mr. Innes was heard for the defendants, and Mr. Searle for the plaintiffs on the question of the claim in reconvention for trespass.

The Court gave judgment for the plaintiff company.

The Chief Justice said: The main question for decision is whether the five claims, possession of which is claimed by the plaintiff company for mining purposes, are diamondiferous or not within the meaning of the 2nd sub-section, section 8 of the articles of agreement by which the land in question had been leased to the defendant company for depositing floors. That sub-section provides that "should at any time any portion of the ground leased as depositing floors be proved to be diamondiferous, the said lessees shall, so far as they are interested in such ground, surrender at the request of the lessors such diamondiferous ground to the lessors, who shall thereupon grant to the said lessees an area of land for depositing ground equal in extent to that surrendered," and shall further pay compensation in manner agreed upon. An application was made to the Court a few days ago for leave to the plaintiff company to test the ground claimed, and the Court, being satisfied that there was *prima-facie* reason for believing the ground to be diamondiferous, appointed Captain Quintrall, an admittedly competent expert, to thoroughly examine the ground, within the limits of the five specified claims, accompanied by a representative of each party. The result of his examination is that three diamonds weighing five-eighths ($\frac{5}{8}$) of a carat were found in 161 loads of yellow ground. The ground is therefore clearly diamondiferous in the sense of containing diamonds, but unless the plaintiff company *bona fide* intended to use the land for diamond mining purposes the mere fact that a few diamonds were found would not justify the plaintiff company in claiming a surrender of the land. I am satisfied that the object of the syndicate which has acquired the claims from the plaintiff company is to work them as a diamond mine. A considerable sum, £1,250, has been paid in cash for the right and a further sum is still to be paid. Taking this fact in connection with the further facts that the yellow ground is similar in appearance to the yellow diamondiferous ground of the Diamond-fields that it contains other minerals which are always found in association with diamonds, and that undoubtedly three diamonds, however small, were found, I am of opinion that the claims in question must be declared to be diamondiferous within the meaning of the articles of agreement. The defence has been raised that the plaintiff company cannot ask for a surrender of the claims without first pointing out the land which is to be given in exchange, but this defence is not supported by the language of the agreement. The word "thereupon" shows that only upon the surrender of the ground claimed can the defendant company demand the equivalent for the ground so surrendered. The claim in reconvention raises the

further question whether the plaintiff company was justified, before action brought, in coming upon the land leased and there prospecting for diamonds. The unlimited right of prospecting would seriously interfere with the use of the ground as depositing floors, and was not in express terms reserved by the lessors. It would be impossible for the owner of any diamondiferous soil deposited on the floors to guard against depredations if such an unlimited right were held to exist, and there is nothing in the articles of agreement from which such a right can be inferred. The right to claim a surrender only arises when the portion claimed is "proved" to be diamondiferous. If the lessees refuse to allow entry for the purpose of affording such proof the Court would, as it has done in the present case, grant leave to make a full examination upon being satisfied that there is *prima facie* ground for believing that the ground is diamondiferous. The articles of agreement omit to state how the lessors are to obtain the requisite information to lay before the Court, and we are not in a position to supply an omission which may fairly be presumed to have been intentional. Of course if the lessees themselves have proved the ground to be diamondiferous the lessors would be entitled to take advantage of the circumstance. The plaintiff company claimed and asserted the right, without leave of the defendant company or of the Court, to enter upon the land leased and prospect for diamonds, and having failed in establishing this right are liable in damages upon the claim in reconvention. The Court will therefore order the defendant company to surrender the five claims as prayed with costs of the claim in convention, and give judgment for the defendant company for £5 damages with costs of the claim in reconvention; the costs of the examination ordered by the Court being part of the costs of the claim in convention.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs Fairbridge & Arderne; Defendants' Attorneys, Messrs. Scanlen & Syfret.]

WALKER V. CLAYTON, N.O. { 1898.
Sept. 11th.

This was an application upon notice calling upon the respondent, the Officer commanding the Royal Engineers in South Africa, and representing the Secretary of State for War in this country, to show cause why the interdict granted by the Court on the 24th January last, restraining the Metropolitan and Suburban Railway Company from passing transfer to the present applicant of certain land situate at the Amsterdam Battery, Cape Town, and expropriated by the company for railway purposes, should not be discharged. The

facts upon which the interdict was granted have already been published.

Mr. Searle now appeared in support of the present application; Mr. Rose-Innes, Q. J., for the respondent.

After argument,

The Chief Justice said: It would be well that the War Department should reconsider their position. With the knowledge that they and their attorneys had in November, 1890, unless they can prove that when transfer was given they were wholly unaware of the circumstances of the case, I think it will be very difficult for them to continue the interdict. The presumption must be that they intended by giving a clean transfer to give the company full power to deal with the land. Therefore the Court will continue the interdict some time longer, say, till the end of the November term.

Mr. Searle asked that it should not be continued so long as that. The War Department should be put under terms to bring an action as soon as possible. He suggested November 15.

The Chief Justice: Of course any action that might be brought by the War Department would have for its main object to have this interdict made perpetual. It might be brought for the purpose of amending the transfer or in some other way, but its main object would be to have the present interdict made perpetual, which can only be done by action. Therefore the present interdict will continue till the 15th of November next, to be dissolved on that date, with costs of this application, unless the respondents succeed in obtaining judgment for a perpetual interdict against the applicant. But I hope there will be no further costs in the matter, if the War Department comes to the conclusion that an action to make the interdict perpetual would not succeed.

EAST LONDON SHIPPING COMPANY, IN LIQUIDATION.

Mr. Benjamin moved for confirmation of the second and final report of the liquidators in the matter of the East London Landing and Shipping Company, in liquidation. On August 1 an order was made that the report lie fourteen days for inspection and that notices be published as directed by the Court. That order had been complied with, and no objection to the report had been received.

The order confirming the report was granted.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

NEWHAM V. MULLIN. { 1898.
Sept. 12th.

Mr. Barber moved for provisional sentence on a mortgage bond for £600, with interest at 8 per cent. from the 1st of May, 1892.
Granted.

THEUNISSEN V. LATEGAN.

Mr. Tredgold moved for provisional sentence for £20, with interest at the rate of 1 per cent. per month, on a promissory note dated 30th June, 1898.
Granted.

BREITMEYER V. KILGOUR. { 1898.
Sept. 12th.

Provisional sentence — Promissory note —
Alleged condition.

Mr. Watermeyer moved for provisional sentence for £350, due on a promissory note dated 18th February, 1892.

Mr. Searle, for the defendant, said the defence was that there was an agreement not to sue upon this note. The circumstances under which it was given were set forth in an affidavit by Kilgour, which was read. It appeared that the note was signed on condition that the plaintiff would not sue upon it, and that defendant would pay when he was in funds.

An answering affidavit by the plaintiff denied these allegations.

The Chief Justice: This is an unconditional promise to pay the sum of £350 in twelve months. Now the statement is made on behalf of the defendant that before he signed this note it was agreed that he was not to be sued upon the note, and was only to pay it when he had funds. Well, if that agreement had been made, the simplest course would have been to have embodied it in the promissory note, and make it a conditional promise to pay. But it is an unconditional promise to pay, and I think it would be a most dangerous precedent to allow such a defence to prevail, particularly upon an application for provisional sentence. It is quite competent for the defendant

to set up this defence in the principal case, but at present we think it should not be allowed. Provisional sentence will be granted with costs.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret ;
Defendant's Attorneys, Messrs. Fairbridge & Arderne.]

FOURIE V. FOURIE'S EXECUTORS. { 1898.
Sept. 12th.

Provisional sentence—Promissory note—Stale demand — Defence — Administration of estate—Executors.

Mr. Searle moved for provisional sentence on a promissory note, bearing date the 17th October, 1878, for £50, made and signed by the late Pieter Jacobus Fourie in favour of the plaintiff.

The matter was before the Court on 1st August last, when it was postponed for evidence as to whether there had been such an acknowledgment as was sufficient to take the debt out of the operation of the Prescription Act. There was evidence now to show that there had been such an acknowledgment, but the defence of the executors was that there were no funds in the estate and that it had been fully administered, and that they had had no notice of the claim.

Mr. Rose-Innes, Q.C., appeared for the defendants, and referred to *Kotsé v. Mo tert* (Buch., 1869, p. 199).

The Chief Justice said: The Court has always been loth to give provisional sentence upon a stale demand, more especially when that demand is made against the estate of a deceased person who is no longer able to defend himself, or to show grounds for opposing the claim. Here we have a claim for provisional sentence upon a promissory note fifteen years ago, made against the estate of a person who died five years ago. Now if it were clear upon the evidence that the executrix were fully aware of this claim before she arranged with her sons for an assignment of the whole estate, I think we should have been inclined to give provisional sentence; but as a matter of fact, it appears that it was not brought to the knowledge of the executrix that there was any such claim. It is alleged that a letter was written; but she swears distinctly that she never received such a letter. The attorney for the executrix gave public notice that all claims against the estate should be filed, and such claims were filed. Before any formal notice of the claim was given to the executrix, she entered into an arrangement with her sons by which they took over the farm, the only asset of the estate, for the amount bequeathed to them, and consented to pay the deficiency, which was

over £2'0. That deficiency was met by the sons, so that there was ample consideration, I think, given by them. It appears that this arrangement was made between the widow and her sons before any formal notice of the claim was given. If that be so, practically the estate was administered and the claim was too late. In an application for provisional sentence, it appears to me that is a sufficient defence. We are of opinion, therefore, that provisional sentence should be refused with costs.

Plaintiff's Attorneys, Messrs. Findlay & Tait;
Defendants' Attorneys, Messrs. Van Zyl & Buissinnc.]

KRESSIN V. SCHMIDT.

Mr. Watermeyer applied for judgment under rule 829 for £101 10s., for work and labour done and materials supplied.—Granted.

SWANSON V. HARRIS.

Mr. Jones moved for judgment for £828 7s. 10½d., money lent and advanced, with interest.—Granted.

WILEY V. BUCK.

Mr. Jones moved for judgment for £48 10s. goods sold and delivered, less £46 paid on account.—Granted.

ADMISSION.

Ex parte MEYER.

On the application of Mr. Joubert, Mr. Louis William Meyer was admitted as an advocate, the oath to be taken before the Circuit Judge at George.

REHABILITATIONS.

The following rehabilitations were granted on motion from the Bar: Cornelis Jacob Britz and Peter Judelsohn.

Re THE MINORS CAIRNCROSS.

Mr. Joubert moved for authority to the Master of the Supreme Court to pay out of the sum to the credit of the minors in the Guardians' Fund an annual allowance to enable the mother to provide for their maintenance and education.

The order was granted in terms of the Master's report.

PETITION OF MARTHA HODGSON. { 1898.
Sept. 12th.

Divorce—Marriage in community—Forfeiture of benefits—Division of joint estate—Costs of action.

Mr Joubert moved for an order declaring that petitioner's former husband, Leenders P. Hopkins, from whom she was divorced by reason of his malicious desertion, has forfeited his rights under the community of property which existed during their marriage.

The petitioner's marriage with Hopkins was dissolved on the 22nd November last with costs, but there was no prayer for a forfeiture. Subsequently to the dissolution of her marriage the petitioner married her present husband. In November, 1881, certain properties were transferred to the petitioner and others from her father's estate. These properties were sold in June of this year, but the Registrar of Deeds refused to pass transfer on the petitioner's power until a forfeiture had been declared. The property is heavily mortgaged, and the share of the purchase price coming to the petitioner does not exceed £20. The petitioner's former husband, Hopkins, is now believed to be in Australia, he had no notice of the present application.

Counsel having been heard, the Court granted the order.

The Chief Justice said: Seeing that the amount coming to the petitioner is so small, and that it would probably all be spent in publishing the notices, and seeing also that the amount of the costs in the case against the petitioner's former husband for divorce is more than his half-share of this property, the Court will, under the peculiar circumstances of the case, grant the order as prayed. My first impression was that a rule nisi ought to be granted for the purpose of giving Hopkins notice, but the expense would be more than the amount in the estate.

[Petitioner's Attorneys, Messrs. Reitz & Herold.

HEUGH V. HEUGH. { 1898.
Sept. 12th

Mr. Barber moved to set aside the interdict obtained by respondent restraining the executor of the estate of the late Thomas B. C. Bailey from paying to applicant, who is respondent's husband, the amount due to his wife out of the said estate.

Mr. Searle, for the respondent, read her affidavit, in which she alleged that she had instructed her attorney to proceed against the applicant in an action for divorce, on the grounds of his adultery.

The Chief Justice: It is clear that the respondent intends *bona fide* to bring the action. There

was some delay, but it is not clear that it was possible for her to bring the action during last year, but she will be put to terms to bring the action next term either in the High Court at Kimberley or in this Court. There will be no order on this application, but the respondent must bring the case to trial next term. The costs of this application will abide the result. The interdict will be dissolved if the action is not brought as directed.

GRIFFIN V. GRIFFIN.

{ 1898.
Sept. 12th.

Mr. Searle moved for an order requiring the respondent to pay to applicant, his wife, the sum of £100, to enable her to defend an action instituted against her in the Barkly East Circuit Court by respondent, for divorce by reason of her alleged adultery.

Mr. Searle said the parties were married in community, into which the applicant had brought £640 odd. She claimed to have a good defence to this action, and she was entitled to be put in a position to place her case before the Court. As to the sum, he should be prepared to accept £50.

Mr. Graham said it was impossible for the applicant, in the face of the letter attached to the affidavit, to have any defence whatever.

The Chief Justice: We shall make an order that £50 be advanced out of the joint estate to enable the applicant to defend the action, costs to be costs in the cause.

SHEARD V. CAIRNCROSS

{ 1898.
Sept. 12th.

Law-agent — Agreement — Alleged breach
—Professional services—Application for
an interdict refused.

Mr. Searle moved for an order requiring the respondent to deliver up to applicant all transfers and papers necessary for effecting transfer of certain landed property, part of the farm Wolwedans, in the district of Mossel Bay, and for an interdict restraining respondent from employing any other person in respect of such professional work, by reason of an agreement entered into between the parties.

On the 11th January, 1881, the petitioner and one Sybrandt Mostert entered into an agreement with the respondent, in terms of which the latter disposed of the goodwill, benefit and advantage of the auctioneering, discounting, law and general agency business theretofore carried on by him in Mossel Bay to the petitioner and the said Mostert, for the sum of £850 sterling which was duly paid to him.

The respondent further agreed, *inter alia*, that from the date of the said agreement he would not at any time thereafter do or cause to be done any act, matter, or thing whatever whereby the said Mostert or the petitioner would be damaged in the said business.

Since the execution of the agreement the petitioner has been carrying on business in Mossel Bay as a general agent.

In October, 1892, one Terblans and one Van Rensburg, of Wolwedans in the division of Mossel Bay, instructed the petitioner to prepare the documents necessary to give transfer to the said Van Rensburg of certain portion of the farm Wolwedans sold to him by Terblans in September 1892, the land being still registered in the name of Terblans, although he sold it to the respondent, but subsequently repurchased it from him without the respondent's having received transfer.

Acting under instructions received from Terblans and Van Rensburg, the petitioner drew up the necessary documents for their signatures and wrote to the respondent enclosing declaration of seller for his signature to enable Terblans to pass transfer. To this and a subsequent letter on the same subject the respondent sent no reply.

The petitioner, having learnt that Mr. Attorney Tennant, of Mossel Bay, had been written to by respondent on the subject of the transfer, called upon Tennant and was informed by him that he had received a letter from the respondent some time previously requesting him to do what was necessary to effect transfer of the said land, first from Terblans to himself (respondent), then from him to Terblans, and lastly from Terblans to Van Rensburg, and that the respondent had enclosed a declaration made by himself and a power to effect transfer from himself to Terblans, and that he (respondent) had written to Terblans telling him to call upon Mr. Tennant with reference to the transfer.

The petitioner said that the respondent's action in ignoring him, omitting to reply to his letters, and directing Terblans to go to another agent to have business, which Terblans and Van Rensburg had entrusted to the petitioner, transacted by such other agent, was calculated to injure him pecuniarily as well as to cast a slur on him, and was a direct breach of that clause in the agreement hereinbefore quoted.

The petitioner prayed that the respondent might be ordered to hand up to him forthwith all such transfers, papers, and writing necessary for effecting the transfers aforesaid as might be in his custody, power or possession, and that he might be restrained from employing any other person in the town or district of Mossel Bay in and about the passing of the said transfer.

Mr. Rose-Innes, Q.C., appeared for the respon-

dent and read his affidavit, in which he alleged that when he resold the property to Terblans it was a condition of the sale that Terblans should pay all expenses and that it was merely to protect himself that he (the respondent) had instructed Tennant to see to the transfers.

He denied that he had committed any breach of the agreement existing between himself and the applicant or that he was under any obligation to employ him as his agent or representative.

After argument,

The Court refused the application.

The Chief Justice said: This is not a case for the interference of the court. All the respondent has done was to employ his own agent to do his own private business, and there is nothing in this agreement to prevent his doing so. It really seems to me almost a puerile application. There is a very trifling matter in dispute, and just for the sake of the few shillings fee which he might have received for this particular transfer from Cairncross to Terblans, the applicant proceeds to set the law in motion for the purpose of obtaining an interdict. I am of opinion that the application ought to be refused with costs.

[Applicant's Attorneys, Messrs Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs Fairbridge & Arderne.]

IN THE CASE OF COENRAAD B. NOLTE AND HIS
SUBSEQUENTLY DECEASED WIDOW.

Mr. Innes, Q.C., moved for authority to Jan H. Nolte to transfer the landed property in the estate situated in the district of Fraserburg, for the sum of £70, to such of the heirs in this colony as are prepared to pay their proportionate amount of the said purchase price.

The Court granted the order.

JEPPE V. STEENKAMP. { 1893.
{ Sept. 12th.

Circuit Court—Case pending—Application
for removal to Supreme Court—No order.

This was an application by the defendant to have the hearing of the case removed from the Circuit Court to be held at Victoria West on the 29th inst. to the Supreme Court. The facts are these:

Criminal proceedings were instituted against the plaintiff on a charge of theft made by the defendant.

The Attorney-General declined to prosecute, whereupon the accused (the present plaintiff) sued the defendant for £2,000 damages.

Service of the summons was effected on the 7th inst., and the hearing of the case set down for the 29th inst., at the next Circuit Court to be held at Victoria West.

The defendant now made the present application on the grounds that as he lived 800 miles from Victoria West it would be impossible for him to summon his witnesses and get up his case by the date fixed for the sitting of the Circuit Court at Victoria West.

Mr. Sheil was heard in support of the application.

There was no appearance for the respondent, whose attorneys had refused to accept short service.

The Chief Justice said it was unusual to ask the Supreme Court to take a case out of a Court in which it was pending.

Mr. Sheil said he had seen that difficulty. At the same time, if the case were not removed to the Supreme Court there would be danger of a miscarriage of justice.

The Chief Justice: If it is so the Circuit Court will remove it. Of course the Supreme Court has jurisdiction over all the country, and it is by no means clear that this power cannot be exercised.

After further argument,

The Chief Justice said: In this case there has been no due notice given to the other side. In the absence of such notice the Court is not prepared to make the order. Besides, it is not at all clear that the defendant will not be able to go to trial at the Circuit Court at Victoria West. All the papers required from the Attorney-General's office can be sent there. If he finds it impossible to go to trial it is quite competent for the Circuit judge to send the case to the Supreme Court. At present I am not satisfied that it could not be heard in the Circuit Court, and therefore no order will be made on this application.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN and Mr. Justice UPINGTON, K.C.M.G.]

TOWN COUNCIL OF CAPE TOWN V. { 1898.
METROPOLITAN AND SUBUR- { Sept. 1st th.
BAN RAILWAY COMPANY

Municipal Regulations — Non-compliance with—Interdict.

This was an application on notice calling upon the respondent company to show cause why they should not be interdicted from continuing with the erection of a galvanised iron structure upon Green Point Common, near the Three Anchor Bay Railway station, and be ordered to remove the same. The facts are these:

By Municipal regulation No. 48, no person is allowed to erect any wooden or iron buildings within the Municipality, without the special consent of the Council having been first obtained.

By regulations 190, 191, and 192, it is laid down that anyone intending to erect a new building shall give notice of his intention to the Council prior to commencing the work, and the forms to be observed with reference to plans to be submitted to the Town Council are clearly set out in these regulations.

Plans for twelve cottages proposed to be erected by the respondents were sent in to the Council on 21st June last. They were returned to Mr. Walker on 28th June, with an intimation that wood and iron erections are subject to special legislation by the Council Board.

The plans were received back under cover of a letter of the 27th June, in which it was stated that the cottages were to be of wood and iron.

These plans were again returned, with an intimation that the regulations 190, 191, and 192 must be conformed to.

On the 17th August, after instructions, the Council's attorneys wrote calling upon the company to remove the erections which are being constructed upon the Green Point Common, near the Three Anchor Bay Railway station, without the approval of the Council of any agreement as to appropriation, or without plans having been approved of by the Municipal authorities, and threatened legal proceedings.

On the 28th August, the construction of the buildings being continued, the Council's attorneys again wrote drawing attention to regulations 48,

190, 191, and 192, and stating that if the respondents did not desist in so doing legal proceedings would be instituted, to which a reply was received, and subsequent correspondence followed, from which it appeared that the respondents were willing to furnish the plans, but intended to construct the cottages of wood and iron.

The respondents are continuing these building operations, though no plans have yet been approved, and are at the present time continuing the erection of a galvanised iron structure near the Three Anchor Bay upon the Green Point Common.

The applicants alleged that the land upon which this structure is being erected is part of the Common, in respect of the expropriation of which the company has paid no purchase price nor any rental, and to the expropriation of which no agreement has been arrived at.

On the 9th of this month plans and specifications were duly lodged with the applicants' attorneys, but the Council had not signified its approval of them, in consequence, as their engineer alleged, of the erections proposed being of wood and iron, that being an initial difficulty.

Mr. Rose Innes, Q.C., was now heard in support of the application, and contended that as the respondent company had not obtained the permission of the Council as required by regulation 48, and as the plans had not been approved of in terms of regulation 194, the Town Council was entitled to the remedy which it sought. Applications of this nature had been granted by the Court, as for instance, in *The Municipality of Cape Town v. Levin* (8 Juta, 164).

Mr. Sheil, for the respondent company, opposed the application, and contended that the Council had waived its right to granting permission by accepting the plans. Regulation 48, however useful and beneficial as applied to the streets of Cape Town, was *ultra vires* and unreasonable as applied to the erection of an isolated building on such a place as Green Point Common. Regulation 48 was framed under section 81 of the Municipal Act (44 of 1892), and was not intended to apply to buildings like the one under consideration, where there were no contiguous houses and no possible danger could be apprehended. In Levin's case there was evidence that the houses proposed to be erected would become a nuisance. The conduct of the applicants was harassing and unreasonable, and their application should be refused.

The Court granted the interdict.

Mr. Justice Buchanan said: The 48rd section of the regulations provides that no person shall be allowed to cover any building with certain materials, or to erect any wooden or iron buildings within the Municipality without the special con-

sent of the Town Council having been previously obtained. In this case the respondents, without having first obtained or even applied for permission, commenced erecting a building of wood and iron. When objection was taken they sent in certain plans, and were told these plans could not be approved without the special consent of the Council having been obtained for the erection of the building. Notwithstanding that, they went on with the work. Section 190 of the regulations requires that whenever a new building is to be erected plans must be sent in to the Town Council before the building is erected, and section 194 states that within fourteen days after receiving the plans the Council shall approve or disapprove of such plans. On the 9th inst., after notice of this motion was given, plans appear to have been lodged. The fourteen days have not elapsed, and the respondents cannot even assume that the plans have been approved of. The Council's engineer states that he could not examine the plans for a wood and iron building until permission had first been obtained from the Council for the erection of such a building in accordance with the regulations. Under these circumstances the applicants are entitled to the interdict, which will be granted, restraining the respondent company from erecting the building until the consent of the Council has been obtained.

Mr. Sheil: The building has been already erected.

Mr. Justice Buchanan: We won't order it to be pulled down.

Mr. Innes: We apply to have such buildings as have been put up pulled down.

Mr. Justice Buchanan: We order that no further progress be made with the building. The order will be to restrain the respondents from proceeding further with the erection of the building until the consent of the Town Council has been asked for and obtained under section 48 of the regulations.

[Applicants' Attorneys' Messrs. Fairbridge & Arderne; Respondent's Attorneys, Messrs. Wessels & Standen.]

In re KAFFRARIAN LANDING AND SHIPPING COMPANY. { 1893.
Sept. 19th

Mr. Watermeyer presented the second and final report of the official liquidators of the Kaffrarian Steam Landing, Shipping, and Forwarding Company. The report had lain for inspection for the prescribed time at the office of the solicitors to the company. The petition prayed that the company be dissolved and the books destroyed.

An order to that effect was granted.

SUPREME COURT.

[Before Mr. Justice BUCHANAN and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte NAGILA. *Re* ARIEFDIEN'S { 1893
ESTATE. { Sept. 26th

Usufructuary—Authority to raise mortgage to repair property—Consent of heir.

This was an application for authority to the executrix testamentary to raise a sum of money on mortgage of certain three houses, situate in Sea-street, Cape Town, the property of the estate, for the purpose of effecting necessary repairs.

Mr. Watermeyer appeared in support of the petition and stated that some of the property left by the testator consisted, of three houses which were in a bad state of repair, and the petitioner, Arifdien's wife, to whom the testator had left the usufruct of all his property for life, and after her death the usufruct to his adopted son with remainder to his children, had been called upon by the Town Council to put them in proper repair. She had already spent a sum of £60 for the purpose, and an additional £65 would be required. The rental received from the houses was £4 18s a month, and the expenditure would be for the benefit of the adopted son of deceased, who consented to the petition.

Mr. Justice Buchanan asked was he the only person interested after the applicant.

Mr. Watermeyer said his children would be interested if he had any. He had no children at present. If he died without issue the property would then go to the testator's sister. Although the repairs would amount to £125, the applicant asked only for a mortgage of £100, being willing to find the balance herself.

Mr. Justice Upington referred to the case of the *Executors of Meyer v. Meyer* (1 Juta, 877) with reference to the duties of a usufructuary of property in returning it to the owner. A strong point in favour of the application, he said, was the fact that the heir consented.

Mr. Justice Buchanan: Seeing that the heir to the reversion joins in the application, we shall give you an order to raise a mortgage of £70 to pay for the necessary repairs and the expenses of this application. It is clear from the case quoted by my brother Upington that it is the petitioner's duty to keep the houses in proper repair.

[Petitioner's Attorneys, Messrs. Fairbridge & Arderne.]

THE CAPE STOCK FARMING COMPANY

Mr. Watermeyer presented the report of the official liquidators in the above, recommending that a further call of £1 10s. per share be made.

The report was received and the usual order made for publication.

Ex parte SIMES. *Re* JONES'S ESTATE. } 1898.
} Sept. 26th.

Executor testamentary—Application for removal—Rule *nisi*.

This was an application for an order removing Guy Halifax from his office of executor testamentary to the said estate, he having left the Colony, and his present address being unknown.

The petition set forth that Elizabeth J. Jones died on the 29th of April, 1884. By her will George Simes, petitioner's minor son, was appointed one of the heirs and Guy Halifax sole executor, who took out letters of administration in September, 1884. He invested the sum of £800 on first mortgage of certain property belonging to one Frederick Mills, who died in May of the present year without having paid the amount of the mortgage bond, which was made in favour of Halifax in his capacity as executor testamentary of Mrs. Jones's estate. Halifax left the Colony in May, 1891, and his whereabouts was unknown and the petitioner alleged that he had been informed that Halifax had no intention of returning to the Colony. He left no power of attorney behind him, and the estate was at present unrepresented. It was necessary in order to prove the bond on Mills's estate that somebody should represent the estate of the late Jones.

Mr. Watermeyer was heard in support of the application and referred to *Grobbeelaar's Trustee v Grobbeelaar's Executors* (Buch. 1879, p. 207).

Mr. Justice Buchanan said if they wished to remove an executor there should be a meeting of next of kin called and a new executor appointed by the Master.

Mr. Watermeyer said he could only ask for a rule *nisi* calling on Halifax to show cause why he should not be removed. The executor's last known place of address was in the district of Aliwal North.

The Court granted a rule *nisi* calling upon Guy Halifax to show cause why he should not be removed from the office of executor testamentary the rule to be returnable on the first day of the November term, and to be published once in the "Gazette" and once in an Aliwal North newspaper.

On the return day the rule was made absolute.

[Petitioner's Attorneys, Messrs. J. & H. Reid & Nephew.]

Ex parte SL TER.

} 1893.
} Sept. 26th.

Derelict land—Municipal rates—Attachment—Sale—Owner of land—Sold—Application for payment of surplus—Master of Supreme Court—Rule *nisi*.

This was an application for the payment to petitioner of the surplus balance amounting to £50 6s. 9d. arising out of the sale of certain nine lots of ground, situated in Port Elizabeth, bought by petitioner in 1864, but not transferred, the said lands having since been sold in execution for the payment of rates and the surplus paid into the Guardians' Fund.

The petition stated that on the 8th February, 1864, the petitioner purchased the lots mentioned at the public sale of an insolvent estate, and duly paid to the trustee £268, the purchase price of the said ground. Power of attorney was obtained for passing transfer, but transfer was not taken, and subsequently the Town Council of Port Elizabeth attached the land under the Derelict Lands Act for unpaid rates. The land was sold without the petitioner's knowledge, as he alleged, and the surplus, amounting to £50 after paying rates, &c., was paid into the Master's Office.

The petitioner applied to the Master for this amount but he declined to pay it over.

Mr. Watermeyer was heard in support of the application.

Mr. Justice Upington pointed out that under the Transfer Duty Act the fines, if enforced by the Government, would amount to considerably more than the balance.

Mr. Justice Buchanan: You may take a rule *nisi*, to be published once in the "Eastern Province Herald," circulating in the place where the land is situate, calling upon all persons interested to show cause why the balance should not be paid to the applicant, the rule to be returnable on the first day of the November term.

On the return day the rule was made absolute.

[Petitioner's Attorney, G. Montgomery Walker.]

ROOSEBOOM & OTHERS V. PIQUET-BERG LICENSING COURT. } 1893.
} July. 18th.

Liquor Licence—Refusal of—Renewal of—Conditions.

It is competent for a Licensing Court, in renewing a liquor licence, which it would have been justified in refusing on the ground of certain abuses, to insert into such licence any conditions, for the removal of such

abuses, which it might have inserted into the original licence, including a condition that the liquor sold shall only be consumed on the premises or that liquor shall only be sold to persons frequenting the hotel kept by the licensee.

This was an application on notice for an order to expunge certain conditions inserted by order of the said Licensing Court in certain retail licences granted by the Licensing Court on the 1st March, 1888, at Piquetberg, to wit:

1. To expunge the condition in a retail wine and spirit licence granted by the said Court to Mr G. Rooseboom for certain premises situated in the district of Piquetberg, and known as The Rest, "that the said Rooseboom should only sell liquor to persons frequenting his hotel."

2. To expunge the condition in the retail wine and spirit licence granted by the said Court to J. Dommissie for certain premises situated at Piquetberg, erf No. 12, "that the liquor was to be consumed on the premises."

3. To expunge the condition in a wine and spirit licence granted by the said Court to J. Dommissie for certain premises situated at Berg River Bridge, "that the said Dommissie should only sell liquor to persons frequenting his hotel."

4. To expunge the condition in a retail wine and spirit licence granted by the said Court to W. R. Dix for certain premises situated at Porterville, erf No 1, block Y, "that the liquor was to be consumed on the premises."

On the ground that the said conditions and each of them are wholly illegal and *ultra vires*, and cause serious loss and damage to the applicants, and farther, why the respondents should not pay the costs of the application.

Affidavits were filed by members of the Court showing that they had voted for the restrictions objected to in consequence of the drunkenness which prevailed in the district of Piquetberg, owing to the farm servants carrying liquor away from licensed places, and afterwards getting drunk, neglecting their work, and in consequence causing loss and damage to their masters, and being a nuisance to the inhabitants generally.

Mr. Juta was heard in support of the application and contended that the conditions imposed by the Licensing Court were unreasonable and *ultra vires*. There was nothing in Act 28 of 1888, section 7 (2), which gave the Licensing Court the power to insert such conditions. No conditions can be imposed which are inconsistent with a retail licence as those in question are. If the present conditions are *intra vires* there is nothing to prevent a Licensing Court from inserting conditions that no liquor shall be sold on hotel premises,

which would be absurd. The condition restricting the sale of liquor to persons frequenting the hotel went further than Act 25 of 1891, section 16, and would have the effect of treating every day as a Sunday.

Mr. Searle, for the respondent, urged that the Licensing Court had a discretion under the section, and that the concluding words "or otherwise" were equivalent to elsewhere. The Court was justified in view of the complaints made in inserting the conditions. He cited the following cases: *Barnett & Co. v. The Namaqualand Licensing Court* (1 Sheil, 186); *Queen v. Transveldt* (5 Juta, 181); *Pearson v. Uitenhage Licensing Court* (3 Juta, 868); *Queen v. Robertson* (9 Juta, 299).

Mr. Juta in reply.

The Court refused the application.

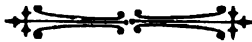
The Chief Justice said: The 50th section of the Liquor Licensing Act 1888 provided that, upon renewing any licence, the Licensing Court might vary the conditions upon which such licence shall be renewed. That section has been repealed by the Act of 1891, but the 48th and 52nd sections still stand unrepealed. Under the 48th section the Licensing Court may, of its own motion, take notice of any matter or thing which, in the opinion of the members thereof, would be an objection to the renewal of a licence, although no objection has been made by any person. Among the objections that may be taken to the renewal of any licence in terms of section 53 are the following: that the business is conducted in an improper manner, and drunkenness permitted upon the licensed premises, and that a licensed place is no longer required in the neighbourhood. In the present case it is clear that the first of these objections might have been taken to the renewal of some of the licences in question, and that, as to all of them the Licensing Court had ample information, derived not only from the numerous petitions presented to them but from their own personal observation, that licensed places were no longer required for the purposes for which the licences had originally been granted. On the original issue of the licences it may have been necessary to allow the liquor sold to be carried away from the premises, and to allow the sale of liquor to persons other than those staying at the hotels in question, but the Licensing Court now came to the conclusion that the necessity no longer existed and that, on the contrary, grave objections existed to the manner in which these rights had been exercised. It would have been competent for the Court to refuse the licences altogether, but as such a course might have been inconvenient to travellers and to the public, the Court in granting the licences attached to them certain conditions. This it was quite competent for them

to do, provided only the conditions were such as might lawfully be attached to any licence. The first condition was that the liquor should be consumed on the licensee's premises. The applicants contend that the true meaning of the 2nd subsection of the 7th section of the Act of 1888 is that every retail licence shall authorise the consumption of liquor on the premises or elsewhere, but this construction attaches no significance to the words "according to the conditions of the licence." These words were, in my opinion, intended to give a discretion to the Licensing Court to decide whether the liquor shall or shall not be consumed on the premises and to impose conditions accordingly. If the terms "canteen licence" or "hotel licence" had been used there would have been considerable force in the argument that it could not have been intended to give any Court the power to impose a condition that the liquor shall not be consumed on the premises. But the words actually employed in the Act and in the licences now in question are "retail

licence," and these words would be equally applicable whether the consumption of liquor was allowed or was prohibited on the licensed premises. The second condition objected to is that liquor shall only be sold to persons frequenting the licensee's hotel. Its object is to provide for the entertainment of travellers and, at the same time, prevent the scenes of drunkenness which, according to the evidence given before the Licensing Court, was not uncommon in the neighbourhood of the premises in question. The condition, therefore was a reasonable one if the respondents had the power to impose it. As to their power to impose it, the case of *Queen v. Transfeldt* (5 Jut., 181), appears to me to be conclusive. The application must therefore be refused with costs.

Their lordships concurred.

[Applicants' Attorney, C. C. Silberbauer;
Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]



DIGEST OF CASES.

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Administrator — Will — Fidei-commis-
sary inheritances.
M. by her will appointed her son
W.W.M. executor and administrator
of certain fidei-commissary inheri-
tances left to her daughters.
In a codicil to her will she appointed
her sons W.W.M. and N.T.M. co-
executors, but made no mention of the
administration of the fidei-commis-
sary inheritances further than by
giving a direction that her executors
might pay the amount of the
inheritances into a trust company if
they considered it needful.
During his lifetime, W.W.M. ad-
ministered the fidei-commissary
inheritances of his sisters but always
consulted his brother N.T.M. as to
the investments.
After the death of W.W.M. a bond,
which had been passed in his favour as
trustee of the fidei-commissary in-
heritances of his sisters was paid.
N.T.M. tendered the bond for can-
cellation on a consent signed by him
as trustee and agent for his sisters.
The Registrar of Deeds refused to
cancel the bond as N.T.M. had no
locus standi.
On application being made to the
Court, N.T.M. was appointed ad-
ministrator with powers to cancel the
bond and with the other power apper-
taining to the office of an adminis-
trator—*Ex parte* Maskew ... 228

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Greef 245

Ailment of indigent parents—Lunatic
son.
A child who has more than sufficient
means for his own support is legally
bound to provide for the alimant of
his parents who are in distress and
unable to work, and this obligation

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may be enforced by a father against
the estate of his son who has been
declared a lunatic by order of the
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The Court ordered the name of a
conveyancer who had been convicted
of theft, fraud, and forgery to be
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no steps in the matter—*In re* Regina
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file—Rule nisi. *Re* Fernandez ... 293

Defamation—*Animus injuriandi*—Privi-
lege—Trap—*Nulla injuria est quae*
in volentem fit.
The defendant a hotel proprietor,

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having found behind a shelf in the bar of his hotel a letter addressed to B., which contained defamatory matter regarding the plaintiff, and which had been left there by the plaintiff, a former proprietor, showed the letter and its contents to the barman on the impulse of the moment, without knowing whether it was genuine or not, and with the view of discovering how the letter came to be there.		The Court overruled an exception to the claim in reconvention that it was not competent in an action for divorce to set up such a claim.	
Held, that even if the occasion was not in strictness of law a privileged one, the circumstances under which the contents were made known to the barman justified the Court in holding that there was no animus injuriandi on the part of the defendant.		Pressney v. Pressney 286	
Subsequently the plaintiff informed one P., a servant in his employment and a customer of the defendant, of the contents of the letter, with a view to P.'s making use of this information to obtain a communication of such contents from the defendant.		2.—Marriage in community—Forfeiture of benefits—Division of joint estate—Costs of action—Petition of Martha Hodgson 333	
Held, upon the principle that nulla injuria est quae in volentem fit, that the success of the stratagem cannot be relied upon by the plaintiff as a ground of action for an injury done to him.		Donation—Transfer—Illicit intercourse—Immoral consideration— <i>Par delictum</i> .	
Bennett v. Morris 317		The defendant while cohabiting with the plaintiff as his mistress gave and transferred a certain house to her, and afterwards, under her power of attorney, sold the house and received the proceeds.	
Derelict land—Municipal rates—Attachment—Sale—Owner of land—Sold—Application for payment of surplus—Master of Supreme Court—Rule nisi— <i>Ex parte</i> Slater ... 338		Held, on appeal against a judgment ordering the defendant to account for such proceeds, that, inasmuch as the land had been transferred to the plaintiff, and the evidence failed to establish the defence that the transfer was not intended to operate as a gift, the defendant could not rely on the immorality of the cohabitation as a ground for treating the proceeds of the sale as his own.	
Derelict Lands Act—Application under Transfer to executor dative— <i>Ex parte</i> Dettmar 271		Aburrow v. Wallis 302	
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		False imprisonment—Malicious arrest—Real injury—Reasonable cause—Constable—Credible information—Ordinance 40 of 1828, section 23. In an action against a constable for malicious arrest, it appeared that he arrested the plaintiff upon information supplied by the owner of a coat which had been stolen from along a	

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<i>roadside and which he had found in the possession of the plaintiff shortly afterwards.</i>	
<i>Held, that the defendant, having acted bona fide upon credible information supplied to him by others, which would justify the conviction of the plaintiff for the theft, was protected from liability.</i>	
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<i>Witnesses to a holograph will can only be dispensed with where the testator has distributed his property amongst all his children.</i>	
Ex parte Pillans	278
Insolvency—Act 38 of 1884—Rehabilitation.	
<i>The Court granted the rehabilitation of an insolvent the account and plan of distribution in whose estate had not been confirmed owing to the negligence of the trustee, who at the date of the application was alleged to be dead but proof of his death was not before the Court.</i>	
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Lessor and lessee—Diamond mine—Diamondiferous ground—Right of	

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prospecting—Appointment of "viewer"—Surrender of land leased.	
<i>By articles of agreement between the plaintiffs, as owners of certain land, and the defendants as lessees of such land for the purpose of being used as depositing floors for their diamondiferous soil from an adjoining mine, it was provided that should at any time any portion of the ground leased be proved to be diamondiferous, the lessees shall surrender such ground to the lessors, who shall there-upon grant an equal extent of other land for depositing floors and pay compensation.</i>	
<i>Held (1) that, in the absence of any express reservation, the lessors had no right of prospecting for diamonds in the ground thus leased; (2) that upon production of prima-facie evidence that the ground leased is diamondiferous the Court may grant leave to make a full examination of the ground and appoint a "viewer" for the purpose; and (3) that if the ground is found to be diamondiferous and the lessees bona fide intend to work the ground as a diamond mine the lessees may be compelled to make the surrender even although upon the examination diamonds have not been found in such quantities as to make it certain that the mine would be payable.</i>	
London and South African Exploration Company v. De Beers Consolidated Mines, Limited	326
Liquor Licence—Refusal of—Renewal of—Conditions.	
<i>It is competent for a Licensing Court, in renewing a liquor licence, which it would have been justified in refusing on the ground of certain abuses, to insert into such licence any conditions, for the removal of such abuses, which it might have inserted into the original licence, including a condition that the liquor sold shall only be consumed on the premises and that liquor shall only be sold to persons frequenting the hotel kept by the licensee.</i>	

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Lunatic—Curator—Landed property—Sale—Confirmation.		<i>Ex parte Rautenbach</i> ..	243
Where it was clearly for the benefit of a lunatic the Court confirmed a sale by the curator of landed property registered in the lunatic's name.		Minor—Landed property registered in name of — Improvements — Mortgage.	
<i>Ex parte Calitz</i> ..	229	Under special circumstances the Court authorised a father, who had registered property in his minor daughter's name, to mortgage the property for the purpose of recouping him for expenditure incurred by him in improvements, he undertaking to be personally liable for the interest.	
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Medical and Pharmacy Act, 1891, section 35—Contravention—Resident Magistrate—Exceeding jurisdiction—Reduction of fine and alternative punishment— <i>Regina v. Adams</i> ..	234	The Courts of this Colony cannot recognise a Native Custom whereby the husband or heir of the husband, whose wife deserts him during his lifetime or his house after his death, may retake by force or stealth the dowry cattle, given upon her marriage to her father, while such cattle are in his peaceable possession.	
Mines and minerals — Diamondiferous ground — Inspection — <i>Prima facie</i> evidence of the existence of diamonds. Where the applicants had leased certain ground to the respondents and under the lease they were entitled to a surrender on the discovery of diamonds in the ground leased the Court on being satisfied that there was <i>prima facie</i> evidence of the existence of diamonds in the land in question ordered an inspection of the ground for the purposes of a pending action.		The plaintiff's daughter, who was accused by her husband's relatives of having caused her husband's death by witchcraft, deserted his late home and returned to her father, whereupon the husband's heir seized from the plaintiff's land the cattle which had been given to the plaintiff upon her marriage.	
London and South African Exploration Company v. De Beers Mines ..	300	Held, that, whether the heir had a right to claim the cattle back or not, he had no right to retake the cattle by	
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<i>force or stealth, an that, upon the principle, spoliatus ante omnia est restituentus the plaintiff was entitled to succeed in an action to recover the cattle so seized or their value from the heir.</i>	
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Negligence—Contributory negligence—Damages for injury.	
<i>In an action for damages for injuries sustained by the plaintiff by reason of the upsetting of a vehicle hired from the defendants, it appeared that the plaintiff had immediately before the accident given the driver some beer, notwithstanding the defendants' previous warning that no liquor should be given to the driver, and that the drinking of the beer made him less careful than he would otherwise have been.</i>	
<i>Held, that the plaintiff having himself contributed to the accident was not entitled to recover.</i>	
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Pauper.	
<i>Where an application is about to be made to the Court for leave to sue in forma pauperis it is the duty of the attorney to satisfy himself that the petitioner is really a pauper before moving in the matter.</i>	
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<i>The plaintiff's cow, which was lawfully grazing on a commonage (in the suburbs of Cape Town), which was separated from the defendant company's railway line by a fence, escaped on to the line through a gate, which it was the company's duty, under the 30th section of Act 19 of 1861, to keep closed.</i>	
<i>The cow was killed in the day-time by a passing train.</i>	
<i>Held, in the absence of any proof that precautions were taken by those in charge of the train to prevent the accident, that there was evidence of negligence to justify a verdict in the Magistrate's Court for the plaintiff.</i>	
<i>Held, further, that as the plaintiff might reasonably have believed that the gate would have been kept closed by the company, there was no proof of contributory negligence in allowing the cow to graze unattended on the commonage.</i>	
Metropolitan and Suburban Railway Co. v. De Villiers	279
Railway regulations—Machinery—Undamageable iron—Restitutio—Protest.	
<i>By the Railway Regulations of the Colonial Government the freight for "machinery" is charged at second-class rates, and for "undamageable iron" at ten per cent. less.</i>	
<i>The plaintiffs having imported certain iron machinery in separate pieces, and entered it in the Customs as</i>	

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"machinery" so as to save the import duty, sent it by railway to Du Toit's Pan.		one-third of the amount guaranteed by him the defendant tendered the amount claimed subject to its being refunded if judgment should be given on appeal to the Supreme Court in favour of another sub-guarantor who had likewise been sued for a similar amount on his guarantee.	
In the consignment notes they described the articles as "undamageable iron," but the Railway Department charged them as for machinery.		Held, reversing the Magistrate's decision that this was not such an unconditional tender as the plaintiffs were bound to accept.	
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*Report to the Hon. Sec. of the
1394*

REPORTS OF ALL CASES

DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE YEAR 1893

(WITH TABLE OF CASES AND DIGEST.)

REPORTED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE
SUPREME COURT, CAPE OF GOOD HOPE.

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1894

**JUDGES OF THE SUPREME COURT DURING THE YEAR
1893.**

Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice.)

„ **Mr. Justice BUCHANAN.**

„ **Mr. Justice UPINGTON, K.C.M.G.**

Attorneys-General.

Hon. J. ROSE-INNES, Q.C.

„ **W. P. SCHREINER, Q.C., C.M.G.**

„ **H. H. JUTA, Q.C.**

ERRATA.

At page 174 in last line of second column read *defendant* for plaintiff.

In the judgment in *Sellar Bros. v. Clark* omit the words *to him* in the 3rd line from top of 1st column at page 199, and read *due by the partnership*.

At page 321 read *Humbly v. Soeker Bros.* instead of *Hambly v. Soeker Bros.*

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CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT.

(IN CHAMBERS.)

[Before Mr. Justice BUCHANAN and Mr. Justice
UPINGTON, K.O.M.G.]

REGINA V. HANS STEVE. { 1893.
Oct. 8rd.

Theft—Conviction quashed on review.

Mr. Justice Buchanan said: This case has come before me from the Special Justice of the Peace at Garies. The accused was charged with stealing a bridle and found guilty. Apparently no theft had been committed. The accused had a dispute with another man about money which he owed him, and he took the bridle and said, I will not give this up till you pay me. There was no concealment and no theft, and the conviction must, therefore, be quashed. The Special Justice of the Peace seems to have called the prisoner into the witness-box and taken his evidence. I do not know whether he did that at the prisoner's request. Some of these Special Justices of the Peace seem to think that the law which qualifies a prisoner to give evidence also compels him to do so. That is not the case; he need not give evidence unless he wishes to do so. The conviction will be quashed.

DICK V. DICK.

Mr. Shippard, on behalf of petitioner, moved for leave to sue *in forma pauperis* in an action against his wife for divorce by reason of her alleged adultery, and for the custody of the minor children of the marriage.

In reply to Mr. Justice Buchanan, Mr. Shippard said he had made inquiries from the attorney, and had found it was a *bona-fide* case. The applicant was a labourer in receipt of £3 a month. He resided at Kull's River.

Mr. Justice Buchanan: You can take the reference, and on certifying, take a rule nisi returnable on the 12th; personal service.

AAA

HEUGH V. HEUGH.

Mr. Watermeyer moved for leave to applicant to sue by edictal citation in an action about to be instituted against her husband for divorce by reason of his alleged adultery, or in the alternative, for a judicial separation *a mensa et thoro*.

The application was granted, personal service to be effected, and the rule to be returnable on the first day of next term.

In re THE ALBERT DISTRICT GOLD- { 1893.
MINING CO. { Oct. 8rd

Mr. Benjamin moved for an order in terms of the third report of the official liquidator, which has been published. The liquidator sought an order to distribute the assets among the shareholders and to have his remuneration fixed. He stated that the final report would be presented at an early date.

Mr. Benjamin in reply to the Court said the remuneration suggested by the liquidator was 10 per cent. on the amount collected, which would be under £800. The previous liquidator had received 5 per cent., but he had collected the larger amounts.

Mr. Justice Buchanan: The question of the remuneration had better stand over as there is only a small sum remaining to be recovered. The liquidator mentions the fact that he was obliged to sue some of the shareholders, and a special fee will probably be granted to him for his trouble in the lawsuit. We shall give a formal order to have a *pro rata* distribution of assets among the shareholders.

WHITSON V. THOMPSON. { 1893.
26th Sept.
& 3rd Oct.

Lunatic—Discharge—Certificate of Surgeon in charge of asylum—*Curator bonis*—Discharge.

This matter was before the Court in Chambers on the 26th September, when an application was made for an order reinstating the applicant in his property and discharging his *curator bonis*. The

application was ordered to stand over so that notice might be given to the respondent the *curator bonis*.

The facts are these:

By order of Court dated 2nd December, 1892, the applicant, who was then an inmate of Valkenberg Asylum, was ordered to be detained as a lunatic in the Asylum hospital or other safe place of confinement until the surgeon in charge should be satisfied that he was no longer of unsound mind, and should certify under his hand accordingly, or until he should be otherwise legally discharged, and David Thompson, the respondent, was on that date appointed curator for the temporary care and custody of applicant's property, but without any power to dispose of the same without an order of the Court.

The applicant remained in Valkenberg Asylum until the 23rd May last, when he was allowed by the surgeon in charge, Dr. W. J. Dodds, to leave the same under the charge of a brother-in-law, named Nixon, in order that he might proceed to Molteno, where Nixon resided.

The applicant remained at Molteno until 11th September last, when he left for Cape Town.

Whilst at Molteno the applicant submitted himself for examination to Dr. Weakley, a medical practitioner there; who certified that he was of sound mind, and capable of looking after himself and his affairs, and upon this Dr. Dodds gave the following certificate:

I certify that Mr. Thomas Tait Whitson has on the certificate of Dr. Weakley, of Molteno, been discharged from my care, and that he is free to obtain any employment.

W. J. Dodds, M.D.

16th August, 1893.

The applicant's wife died on the 14th April last, leaving four children, all minors.

The applicant alleged that the *curator bonis* had done nothing since his appointment toward providing for the support and maintenance of the applicant, who had been obliged to contract a number of debts, which he now required to liquidate.

Further, that his mental and bodily health having been restored he was now desirous of being reinstated in his property, so that he might look after the same as well as the property of his deceased wife, who died testate leaving a mutual will, under which the applicant, as survivor, was appointed executor and guardian of the minor children.

He prayed that he might be re-instated in his property and that his *curator bonis* might be discharged.

The respondent in his answering affidavit alleged that he had consulted several medical men,

and was informed by them that the applicant was not of sound mind.

That since the applicant's return from Molteno he had exhibited in course of conversation signs of extreme violence, and that he (respondent) was not satisfied that he was mentally capable of undertaking the responsibility of having the custody of the children or of managing his affairs.

The respondent alleged that since the death of the applicant's wife he had taken charge of, maintained and supported the applicant's minor children.

That the only asset in the estate was a house which was occupied by the applicant's wife until her death, and that during her life and since her decease he had disbursed moneys in connection with necessary repairs. That the property was now let, and the rent was being applied to the maintenance of the children.

The respondent suggested that before granting the application an opportunity should be afforded of having the applicant examined by medical men appointed by the Court, and that Dr. Beek, who was his physician previous to his being placed under curatorship, and who was aware of his previous mental condition, should be referred to.

The applicant in his answering affidavit referred the Court to Dr. Dodds' certificate. He denied that the assets consisted only of a house, but said that there was furniture and some funds, which the *curator bonis* refused to hand over, although requested. He was unable to find employment, or to pay his hotel bill, and was utterly destitute.

Two doctors were present in Court but their evidence was not taken.

Mr. Giddy appeared for the applicant, and Mr. Rose-Innes, Q.C., for the respondent.

Mr. Justice Upington remarked that the petitioner was as free as regarded lunacy as any man in the community, and no one of his own family asked to have him declared a lunatic.

Mr. Justice Buchanan pointed out that the order was that petitioner should be detained in an asylum until the surgeon in charge declared he had recovered. He had been released by Dr. Dodds.

Mr. Innes said the curator had no interest in having Whitson declared a lunatic. Dr. Dodds simply certified that on another doctor's certificate he had discharged the petitioner from his care. He gave no certificate from his own knowledge.

Mr. Justice Upington said that although Dr. Dodds's certificate was a little loose, it must be presumed that he certified to the petitioner's sanity.

Mr. Innes: He was originally released under the provisions of section 71 of the Lunacy Act, 1891, on probation.

Mr. Justice Upington: The test would be: could they retake him and put him in a lunatic asylum?

Mr. Innes: Dr. Dodds could put him back under the regulations.

Mr. Giddy: He was provisionally discharged on the 23rd of May, and went to Molteno Dr Wheatley certified that he was of sound mind, and on that Dr. Dodds gave his certificate.

Mr. Innes: The only question was the technical one, whether the man had been discharged.

Mr. Justice Buchanan: Dr. Dodds's was a badly-drawn certificate, but it seemed to him to give the man his liberty.

Mr. Justice Upington: The Attorney-General ought to consider the advisability of having a special form of certificate for these cases.

Mr. Justice Buchanan: If they wish to detain him further, they must institute fresh proceedings.

After further argument,

Mr. Justice Buchanan said: As has already been remarked, the certificate is not very clear; it ought to have been better drawn, and as my brother Upington suggested, the Attorney-General ought to give a special form of certificate to asylum officers for these cases. Under the order of the Court the officer in charge of the asylum has power to discharge the applicant from his care when he considers him a sane man. I read the certificate of Dr. Dodds that he discharged this man on the ground that he was no longer insane. That being so, the appointment of Mr. Thompson as *curator bonis* is discharged, and he will have to account to the Master for the funds he received. The lunatic will be reinstated in the custody of his property. The costs of this application, I think, may fairly come out of the estate.

[Applicant's Attorneys, Messrs and H. Reid and Nephew; Respondent's Attorney, C. C. Silberbauer.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN and Mr. Justice UPINGTON, K.C.M.G.]

ADMISSION.

Ex parte NIXON.

Mr. William Thomas Nixon was, on the application of Mr. Shell, admitted as a notary public.

Re PAARL FRUIT-PRESERVING COMPANY. { 1898.
Oct. 10th

Company—Voluntary—Winding-up.

The Attorney-General (Mr. Schreiner, Q.C.) moved for an order placing the said company under the operation of the winding-up clauses of the Companies Act, 1892, and appointing official liquidators. There were two petitions, one by creditors and the other by the two gentlemen duly appointed at a special meeting, held on September 29, to represent the company. He applied under Act 25 of 1892, section 185, sub-section 1. At the special meeting it was resolved to wind up the company, and Mr. J. J. de Villiers and Mr. J. F. P. Perold were recommended as official liquidators to wind up the company at the least possible expense. There was no opposition. The company was in such a position that the assets would probably realise sufficient to pay the liabilities. Counsel asked that the gentlemen named should be appointed official liquidators with the powers conferred by section 149, and without applying for the sanction of the Court, as provided by section 150. There would be no calls, as all the shares were paid up. The liabilities were £2,800 odd, and the assets would cover that, if carefully realised, as well as the expenses of administration.

Mr. Justice Upington asked was it clear that the meeting, which resolved upon liquidation, had been duly convened.

Mr. Schreiner replied in the affirmative.

Mr. Justice Buchanan: Take an order placing the company in liquidation under Act 25 of 1892 section 185 (1), Mr. De Villiers and Mr. Perold to be official liquidators, with all the powers under section 149, which powers they can exercise without application to the Court as provided by section 150. The official liquidators will be required to give security for the sum of £1,000.

Mr. C. O. de Villiers was appointed attorney for the liquidation.

Ex parte BLOM. { 1898.
Oct. 10th.

Crown Lands Disposal Act—Purchase in name of minor—Bond—Father and natural guardian.

The Court authorised a father, who had bought land under the Crown Lands Disposal Act, 1887, in the names of his minor children, to pass a bond to the Government for the balance of the purchase price as his children's father and natural guardian.

This was the petition of Christian Bernardus Blom, of De Kuilen, in the division of Sutherland as father and natural guardian of his minor children.

On the 20th April, 1892, the petitioner purchased on behalf of and in the name of his minor children, at public auction held at Sutherland under Act 15 of 1887, certain land in the division of Sutherland, for the sum of £177, of which the sum of £35 was paid.

The petitioner was desirous of passing a bond in favour of the Government for the balance of the purchase price, but the Registrar of Deeds declined to allow him to pass the bond as father and natural guardian of his minor children without an order of Court.

The petitioner then applied to have himself treated as the purchaser of the property instead of in his aforesaid capacity, but the Government refused to accede to this request.

The petitioner now prayed that the Court might authorise him to pass a mortgage bond to the Government as father and natural guardian of his minor children for the balance of the purchase price of the land in question.

The matter was referred to the Master, and he reported *inter alia* that the transaction appeared to be beneficial to the minors, and expressed the opinion that the application should be granted.

Mr. Tredgold was heard in support of the petition.

The Court granted the order.

Mr. Justice Buchanan said the Court had great hesitation in granting such orders. In this case, however, there was no alternative but to do so.

Mr. Justice Upington said property was often in these cases bought for the minors, but the parents got the benefit and the creditors were left in the lurch.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

SMIT AND OTHERS V. WOOD { 1898.
BROTHERS. { Oct. 12th.

On the application of Mr. Castens, the final adjudication of the defendants' estate was decreed.

LE ROUX V. FULLER.

Mr. Sheil moved for provisional sentence on a promissory note for £80, less £7 paid on account, with interest from 24th September, 1886.

Granted.

BROWN V. WIGMAN.

Mr. Jones moved for provisional sentence on an IOU for £7 15s. 7d. No certificate of presentment was filed.

The Court granted provisional sentence, no objection being raised by the defendant.

ABBOTT'S TRUSTEE V. FATIMA.

Mr. Barber moved for provisional sentence on a mortgage bond for £65 interest.

Granted, and property declared executable.

ERLANK AND CO. V. NAUDE. { 1898.
Oct. 12th.

Writ of arrest—Confirmation.

Mr. Searle moved for confirmation of the writ of arrest issued against the defendant, and moved for provisional sentence for the sum of £112 15s. on a promissory note, dated 20th June, 1898, and payable on the 20th September, 1898, made in favour of J. H. Erlank & Co. The defendant had been arrested, but subsequently released on entering into a bond of security.

The plaintiff filed an affidavit in which he alleged that the defendant was about to leave the Colony for the S.A. Republic.

On the question of confirming the writ of arrest, counsel cited *Loraine v. Potter and Bellew* (2 Sheil, 110).

The Chief Justice said: The case of *Loraine v. Potter and Bellew* was for an illiquid claim, but in principle I confess I do not see any difference between a liquid and illiquid case. I think we are bound to follow in this respect the previous practice of the Court. In the first instance a motion is made for confirmation of the writ of arrest, and the Court will make that order; then there is an application for provisional sentence, which the Court will also grant.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

ERLANK AND CO. V. STEVENS.

This was a similar case. Mr. Searle moved for confirmation of arrest and for provisional sentence for £184 18s. 7d., with interest at 8 per cent.

An order was granted similar to that in the previous case.

REHABILITATIONS.

The following rehabilitations were granted on motion from the Bar: Jacob Jacobus de Klerk (release), Alfred Leach, Christian Matthys Keyser, Charles Grey, Christoffel Jacobus Ludovicus Botha, D.H. son, Theunis Jacobus Botha, D.H. son, Ernest Edward Wellbeloved, Hercules Petrus Wasserman.

Ex parte VILLIBSDORP MUNICIPALITY.

Mr. Oostens moved to make absolute rule nisi, issued under the Titles Registration and Derelict Lands Act, for the attachment and sale by the Sheriff of certain four lots of ground, situate in the Municipality, in satisfaction of the arrear rates due thereon.

The rule nisi had been granted by Mr. Justice Upington on 26th August. A similar application was made on April 12, but after the rule had been made absolute, it was discovered that the wrong property had been attached. This was the amended application.

The order was made as prayed.

Re STEYN'S INSOLVENT ESTATE.

Mr. Buchanan applied for a further term of six months to enable the trustee of the said estate to file his account and plan of distribution, he having experienced great difficulties and legal proceedings in his endeavour to realise the assets.

An order was made for an extension of four months' time from this date.

**CAPE CENTRAL RAILWAYS. { 1898.
Oct. 12th.**

Mr. Schreiner, Q.C., presented the final report of the official liquidator, and applied for an order of confirmation and of remuneration for the official liquidator.

The report was in the following terms:

1. In a special report presented to this Honourable Court on the 16th December last, the official liquidator reported that the official liquidator in England had entered into an agreement for the sale of all the company's property and assets to a trustee for an intended new company upon the terms therein stated, and applied for the assent of this Honourable Court to the proposed arrangement, and prayed that the official liquidator be authorised and directed to do all things necessary for carrying the same into effect in accordance with and subject to the provisions and requirements of the said agreement dated the 12th August, 1892.

2. The Court was pleased to order in terms of the prayer of the said report.

3. Under the authority of the said order the sale was duly completed, and transfer and delivery made to the "New Cape Central Railway (Limited)"—a company duly constituted and registered in England under the Companies' Acts—of the line with all the assets and property of the said company in liquidation.

4. The debenture-holders in England have duly received the new debentures, shares, and cash to which they respectively are entitled in terms of the agreement sanctioned by the Court as afore-

said, and the debenture-holders who claimed in this colony have similarly been satisfied in this colony.

5. Of the creditors other than debenture-holders who lodged claims with the official liquidator Messrs. Linklater & Co., of London, claimants for £48 18s. 8d., have withdrawn their claim, and the only other creditors, namely: G. G. Preiss, £60 4s. 8d.; Fairbridge & Arderne, £76 11s. 6d., have, with the assent and the authority of the official liquidator in England and of the directors of the new company, been paid in cash the full amount of their respective claims.

6. There now remain no further duties to be performed by the official liquidator in this colony.

7. Upon the registration of the new company in England the official liquidator, appointed in London on the 9th February, 1893, executed a formal deed of conveyance, wherein he duly acknowledged receipt of the consideration for the alienation of the company's property, and formally conveyed all his right and title thereto to the said new company.

8. Thereafter on the 11th August, 1893, upon the application of the official liquidator, and after reading, among other documents, the affidavit of Mr. Tom Drew Bear that the affairs of the said company were completely wound up, it was ordered by the Chancery Division of the High Court of Justice in England in the terms following: "That the said Tom Drew Bear be discharged from being official liquidator of the said Cape Central Railways (Limited), and it is ordered that the Cape Central Railways (Limited) be dissolved as from the date hereof; and it is ordered that the deed dated the 20th March, 1893, executed by the said Tom Drew Bear and the London Guarantee and Accident Company (Limited) by which it was agreed that the security given by the said Tom Drew Bear as receiver in the action *Reid v. The Cape Central Railways (Limited)*, 1889, R. No. 1, should stand as a security for what the said Tom Drew Bear should receive as a official liquidator of the said company be rescinded and vacated, and it is ordered that such of the books and documents in the possession of the said Tom Drew Bear, as official liquidator as aforesaid, be delivered over to the New Cape Central Railway (Limited) having its registered office at No. 11A, Queen Victoria-street, in the City of London.

9. In proof of the matters aforesaid, the said liquidator annexes hereto the following documents: (1) A copy of the order of this Honourable Court granted on the 16th December, 1892, assenting to the sale of the property of the said company in liquidation; (2) the said deed of conveyance executed in England on the 9th February, 1893; (3) the said order of the Chancery Division of the

said High Court, dated 11th August, 1898; (4) an office copy of the affidavit of the said Tom Drew Bear, upon which the said order was granted, sworn the 9th August, 1898; (5) receipts signed by the debenture creditors in this colony for the debentures, shares, and money delivered to them respectively in discharge of their claims.

10. With the report is also submitted an account for the period between the date of the last account appended to the third annual report (*vide* the 31st July, 1892) and the 31st December, 1892, duly audited and certified by Mr. E. R. Syfret, public accountant.

11. The official liquidator, in submitting this report and its annexures, prays: (1) That he be authorised formally to assent to the said deed of conveyance, dated the 9th February, 1898, referred to in paragraph 7 of this report; (2) the assent of this Honourable Court to the said order of the Chancery Division of the High Court of Justice in England for dissolving the company; (3) that this Honourable Court will be pleased to fix the amount to be paid to the official liquidator for his remuneration for managing the affairs of the company and other expenses for the period between the 31st July and 31st December, 1892; (4) that the security given by the official liquidator for the due performance of his duties be rescinded and vacated; (5) that the books and documents in possession of the official liquidator may be delivered over to, or held by him at the disposal of, the new Cape Central Railways (Limited), or for such other or further order as this Honourable Court may deem fitting in the premises.—Cape Town, October 5, 1898.

THOS. C. SCANLEN.

The Chief Justice said: As all the parties are satisfied there seems to be no necessity for further notice, and you may take the order as prayed for. The Court will fix the remuneration to the liquidator at £50 per month from the 31st July to the 31st December, 1892.

[Attorneys for the Company, Messrs. Scanlen & Syfret.]

Ex parte DOWER.

Mr. Molteno moved for leave to the father and natural guardian to sell the minor's share of a certain farm, known as Banchoory, situated in the district of Mount Currie, and to pay into the Guardians' Fund the proportion of the purchase price accruing to the said minor.

The order was granted.

SMITH V. BROAD. { 1898.
Oct. 12th.

Interdict.

The Court granted an interdict restraining the respondent from cutting wood on a farm

which he alleged he held for a term of three years under an agreement of lease, but no lease had been actually executed.

This was the return day of a rule *nisi* granted on the 24th August last, and which operated as an interdict, calling upon the respondent to show cause why he should not be restrained from cutting, chopping, or removing wood from any portion of Grassridge, No. 2, of the Balmoral Estate, in the district of Uitenhage.

The petition of the present applicant, the *curator bonis* in the estate of the late Frederick Bertie Worsley Roberts, of Balmoral, upon which the rule *nisi* was granted, alleged *inter alia* that the respondent Charles Broad had taken possession of a portion of the Balmoral Estate, called Grassridge No. 2, which he asserted he was entitled to under a lease alleged to have been entered into between himself and the late Frederick B. W. Roberts.

The applicant denied the validity of this lease, and alleged that he intended to contest the same as soon as it was possible to do so, but that in the meantime the respondent was denuding the property of wood and destroying the place thereby, and that it was highly necessary in the interests of all concerned that he should be debarred and restrained from so doing.

Upon these facts the rule *nisi* was granted.

Mr. Searle now moved that the rule *nisi* be made absolute, and read the supporting affidavit of one William Harvey, a farmer, of Grassridge No. 4, who alleged *inter alia* that the respondent had been chopping down the best wood on the farm, and that he was doing this in such a manner as to seriously damage the farm and decrease its value.

That it was usual for the owner of a farm if he let it for wood cutting to stipulate that only a certain number of loads should be taken away within any given time.

That the farm Grassridge No. 2 was a good farm both for wood cutting and pastoral purposes, and that its value had been seriously diminished and would continue to be so if the wood cutting operations of the respondent were continued.

Mr. Sheil opposed the application and referred to the respondent's affidavit in which he alleged that in December, 1892, he negotiated with Frederick B. W. Roberts, the deceased, to acquire the right of chopping firewood on the farms Grassridge No. 2 and Doornkoms.

That after a long negotiation the deceased and himself came to terms on the 15th December, 1892; the former submitted a letter to him offering him either of the two farms at £40 per annum each rent and 2s. 6d. per load royalty on wood,

That he agreed to the terms of the letter and that the deceased told him he could have the letter another time, and a day or two afterwards the deceased handed him the same or a duplicate letter in the presence of Captain Nixon.

Copy of the letter, the original of which was in the handwriting of the deceased, was annexed to the affidavit.

That he (the respondent) accepted the deceased's offer as to the farm Grassridge No. 2 on the 8rd January, 1898, and took possession of the farm within the time stipulated in the letter, and during the lifetime of the deceased.

That he took the farm for the express purpose of chopping and selling firewood therefrom, and that it was of no value for any other purpose.

The respondent further alleged that he had spent over £800 in improving the farm, and he denied that he had done any damage or injury to the farm as alleged in the petition, or that he had acted in any way contrary to the true intent and meaning of his agreement with the deceased.

The respondent denied the statements made by Harvey, and alleged that neither he nor the applicant had any personal knowledge of the manner in which wood was being cut on the farm Grassridge No. 2.

Finally he alleged that he had entered into various engagements for the sale of wood, and that he would suffer very serious damage and loss if any order was made interfering with his just rights under his agreement with the deceased.

Captain Nixon in his affidavit corroborated the statement of the respondent as to the letting of farm Grassridge No. 2 by the deceased.

Several other affidavits sworn to by the farmers resident in the district were filed, all going to show that the respondent was chopping firewood in the usual and proper manner.

That the farm was useless except for wood cutting purposes and that the respondent had greatly enhanced the value of the farm by the improvements which he had effected.

Replying affidavits to the above were filed alleging that the document of the 15th December, 1892, on which the respondent based his claim, had been obtained from the deceased whilst he was under the influence of drink given to him by respondent. These charges were denied by Broad.

The letter of 15th December, 1892, was in the following terms :

*Balmoral, Uitenhage,
15th December, 1892.*

Dear Mr. Broad,—I offer to let you either of the farms Doornkoms or Grassridge No. 2 at a term of three years from Xmas, 1892. at a rent for either of £40 per annum and 2s. 6d. a royalty per load of any wood cut.

This offer stands good for three weeks from to-day's date.

It is understood I reserve all minerals, if any, with free access to acquiring and boring for and removing same.

It is understood you are not to sublet without my consent the land or wood-cutting rights.

*Yours truly,
Worsly Roberts.*

C. Broad, Esq.

This letter was delivered by Roberts to the respondent, and the latter on the 8rd January, 1898, wrote accepting the offer of Grassridge No. 2 on the proposed terms.

No written lease was however executed between the parties, but Broad took possession of the farm a few days before the death of Roberts and has since remained in possession.

After argument,

The Court made the rule absolute.

The Chief Justice said : It is quite clear that an action will have to be brought to decide the rights of the parties, and the only question is who is to bring the action. In my opinion the action should be brought by the respondent, because there is *prima-facie* reason for believing that ultimately the applicant will succeed. Of course no definite judgment can be given until we hear the whole case. The applicant only asks for an order restraining the respondent from cutting or removing wood from any portion of the farm. There is no application for ejectment, and the Court will make the rule absolute, with leave to the respondent to bring an action to set aside the interdict and to recover such damages as are sustained by him by reason of the interdict. The costs of the application will abide the result.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Van Zyl & Buissiné; Respondent's Attorney, Messrs. Scanlen & Syfret.]

*Re THE MINORS MOLLER. } 1898.
 } Oct. 12th*

Mr. Shippard moved for authority to the parents of the said minors to raise a sum of money on the security of a certain life policy, settled by ante-nuptial contract, for the purpose of defraying expenses incurred in the education of the minors.

The Chief Justice : The Court will authorise the trustees of the ante-nuptial contract to raise such sums of money as may be required from time to time for the purpose of paying the school fees of petitioner's children as they become due, and also premiums and fines upon the policy, not exceeding the sum of £200. This authority is given to the trustees, and not to the petitioner.

Re PALMER'S ESTATE.

Mr. Buchanan moved for an extension for twelve months to the executors of the said estate, to enable them to file an account of their administration, the affairs of the deceased being somewhat confused by reason of the defective state of the records of his business transactions.

Affidavits having been read, the application was granted.

Re CAPE OF GOOD HOPE BANK.

Mr. Innes, Q.C., applied for the sanction of the Court to certain compromises proposed to be effected by the official liquidators with shareholders and debtors.

The following was the list of compromises :

Estate of John Powell, £800 as a shareholder, offers £80, which has been paid.

J. Michels, late of Port Elizabeth, now of Berlin, £3,798 10s. as a debtor, offers £500, which has been paid.

S. H. N. van der Riet, Graham's Town, £207 2s. as debtor, offers 2s. 6d. in the £, which has been paid, in consideration of which the liquidators will cede and assign to Mrs. J. D. van der Riet all claims against the debtor. The concurrent creditors, except two, have agreed to a composition on a similar basis.

A. G. Paterson, late of Tarkastad, now of Humanadorp, became indebted to the bank in 1888 as maker of promissory notes on overdrawn account to the extent of £15,076. The bank sequestered his estate, and took over his life interest in a sum of £6,947, which is now in the hands of a trustee. The bank had regularly received the income from his life interest, and in order to make the same secure for another five years, the debtor consented to the liquidators insuring his life for that period for £1,300, conditional on their undertaking to re-assign to him the life interest in the £6,929 after receipt of the income arising therefrom for the five years. The insurance could be effected with the English and Scottish Law Life at an annual premium of £19 19s.

An order was made as applied for.

DICK V. DICK.

Mr. Shippard moved to make absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action against his wife for divorce, by reason of her alleged adultery.

The application was granted.

WANNENBERG V. SCHAAF.

Mr. Buchanan moved to make the award of the arbitrators with regard to the sub-division of

the shares of lot K of the farm Roode Loeuvel, in the district of Uniendale, a rule or order of this Court.

In answer to the Court, counsel stated that the respondent had received notice of the present application, but a copy of the award had not been served on him.

The Chief Justice said: The Court will make an order that the award lie on the table, and be filed with the Registrar, and if no objection be made before the first day of next term, that it be made a rule of Court on that day without a further application.

Re NORTJE'S INSOLVENT ESTATE.

Mr. Searle applied, on behalf of the trustee, for an order restraining the insolvent from passing transfer of a certain farm, the property of himself and his wife, to whom he is married in community.

There was some evidence to show that the creditors had abandoned their claim to the farm under a misapprehension that the insolvent's wife had only a life interest, but it was not clear as to whether notice of the abandonment had been given to the insolvent.

The Chief Justice said under the circumstances notice of the application must be given to the insolvent.

HENNINGS V. HENNINGS.

Mr. Currey applied to have this action, which is one brought by the wife *in forma pauperis* for divorce, removed from the Supreme Court to the Circuit Court at Burghersdorp. The plaintiff was unable to find funds to come to Cape Town.

The Chief Justice: The application would be granted if due notice were given to the respondent.

Mr. Currey: We do not know where he was. The citation and rule were published in a Bechuanaland newspaper.

The Chief Justice said the summons was for the 1st November. Application could then be made to have it removed.

Mr. Currey: The Court sits at Burghersdorp on the 18th of the present month. Failing an order for removal, counsel asked for a commission to take plaintiff's evidence at Burghersdorp.

The Court made an order to this effect, appointing the Magistrate Commissioner.

Ex parte NELSON. { 1898.
Oct. 12th.

Ante-nuptial contract—Life policy—Trustees
—Payment for advances.

This was the petition of Charles Edward Nelson, of Johannesburg.

It appeared from the petition that on the 28th December, 1852, an ante-nuptial contract was entered into between Charles Horatio Nelson and Emily Loxton Loxton, both of Graham's Town, by which *inter alia* a certain policy of life assurance, to be thereafter effected on his life by the said C. H. Nelson for £1,000, was, with any additions to the capital sum thereof, assigned, transferred, and made over by the said C. H. Nelson to John Edward Nelson and Francis Tudhope, in trust for the said Emily Loxton Loxton and the children of the intended marriage of her and the said C. H. Nelson, and the issue of such children as should predecease the said Emily Loxton Loxton. Subsequent to the said marriage on the 14th July, 1853, the said C. H. Nelson effected with the Mutual Life Assurance Society of the Cape of Good Hope, now called the South African Mutual Life Assurance Society, a policy of assurance on his life for the sum of £1,000, which policy was thereafter on the 12th August, 1853, formally ceded by C. H. Nelson to John Edward Nelson and Francis Tudhope, the trustees in terms of and for the purposes specified in the ante-nuptial contract.

Tudhope having died, and the remaining trustee being desirous of being relieved of the trust, with the consent and approval of the said C. H. Nelson, and in terms of the ante-nuptial contract, nominated the petitioner and George Nelson in the place of the said trustees as joint trustees under the said ante-nuptial contract, with authority to act in all matters connected with the said policy of assurance as if they were the trustees originally appointed, and they have acted as such trustees since their appointment on 15th July, 1855. Emily Loxton Loxton predeceased her husband the said C. H. Nelson, who is unable to pay the annual premiums payable in respect of the said policy, and the petitioner and his co-trustee have already advanced and paid premiums amounting to the sum of £202 1s. 6d. in order to keep the said policy on foot.

The petitioner and his co-trustee alleged that they experience much difficulty in providing for the payment of the insurance premiums, and that they are entitled under the ante-nuptial contract to repayment of the sums advanced by them out of the said policy when the same becomes payable.

That the accumulated profits on the policy amount as a vested interest to the sum of £1,157 in addition to the capital sum of £1,000, the original amount of the said policy.

Thirteen children were born of the marriage, ten being now living, all above the age of twenty-one years.

The surviving children are desirous that the petitioner and his co-trustee should be relieved

from all further responsibility as regards the payment of the premiums necessary to keep the policy on foot, and that they should be repaid the sums of money that have already been expended by them for that purpose; and they have agreed that the petitioner and his co-trustee should arrange with the South African Mutual Society for the payment of the cash equivalent for the accumulated profits on the said policy, and should receive and apply the same:

1. In payment to the South African Mutual Society of a sum sufficient to convert the said policy of assurance into a fully paid-up policy, to be held by the petitioner and his co-trustee upon trust in terms of and for the purposes of the said ante-nuptial contract.

2. In payment to the petitioner and his co-trustee of all sums of money that have been advanced and paid by them for the purpose of keeping the present policy of assurance on foot, with 6 per cent. per annum interest from the respective dates on which said sums were so advanced and paid.

3. To apply the balance, if any, as the petitioner and his co-trustee may think fit.

A deed embodying the foregoing arrangement and signed by the children was annexed to the petition.

The prayer was for an order authorising the South African Mutual Society to pay to the petitioner, as representing himself and his co-trustee, out of the accumulated profits on the said policy of assurance the sum of £202 1s. 6d. advanced by the petitioner and his co-trustee for the purpose of keeping the policy on foot, and the further sum of £76 16s. 6d., being the interest due in respect of such advances, and to apply the balance of the accumulated profits to the conversion of the said policy into a fully paid-up policy in favour of the said Charles Horatio Nelson, for the original sum of £1,000, or such further sum as may be equivalent to the said balance of accumulated profits.

Mr. Rose-Innes, Q.C., was heard in support of the petition.

The Court granted an order in terms of the prayer. Costs to be paid out of the fund.

[Petitioner's Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN
and Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. KLEINSCHMIDT. { 1898.
Oct. 18th.

Police Offences Act—Police-constable—
Arrest—Public-house—Right of entry.

Where a police-constable has the right of arresting a person for contravening any of the provisions of the Police Offences Act, 1882, he has the power, for that purpose, to enter a licensed public-house in which the offender has taken refuge, and the doors of which are open, even although he has not obtained the consent of the owner, and such owner who tries to prevent the arrest is liable for a contravention of section 8, sub-section 5, of the Act.

Appeal from a sentence passed upon the appellant by the Resident Magistrate of Caledon.

The accused was charged with the crime of contravening section 8, sub-section 5, of Act 27 of 1882, in that upon or about the 7th day of September, 1898, and at or near Caledon he, did wrongfully and unlawfully hinder Police-Constable Samuel Oliver in the execution of his duty.

Samuel Oliver gave the following evidence: I am a police-constable and know the accused, who is the canteenman of Mr. De Possel Deydier's canteen. On the evening of the 7th September last I was in Dempers-street, the same street as this canteen is in, and hearing so much noise and cursing and swearing in front and in the canteen. I went there, and on reaching it, a lot of women, were running out of the canteen. One of the women was swearing and using abusive language. I wanted to apprehend her, but she ran back into the canteen. I followed her and arrested her in the canteen, and as I was bringing her out the accused rushed out from behind the counter and came towards me and caught hold of my arm, and told me that I had no right to apprehend people in the canteen. In the meantime this woman made her escape. I told prisoner I had a perfect right to apprehend the woman in his canteen. Prisoner wanted to push me out of the canteen, but I resisted. I would not know the woman again, and she has not been brought to trial. The other barman also told me that I had no right in the canteen or in front of the canteen.

Cross-examined: I was in Dempers-street when I heard the disturbance. Prisoner kept me back so that the woman made her escape. I had no hold of the woman. I pushed her in front of me with the intent of arresting her. I did not apologise to the accused. Neither did I say to him that my word would be taken in preference to his.

The accused, in his evidence, stated that he did not hear the woman make any disturbance outside the canteen, or use bad language; that he never touched the constable, but simply told him not to interfere with the woman, or he would put him out of his canteen.

Daniel Stoddard, called for the defence, deposed that he saw three women coming out of the canteen. One of them used bad language towards one of the other women, but he could not positively say which of them used the bad language. The three women then went round to the canteen, but how many went in he could not say. The constable followed them up into the canteen, and he (witness) went to stand opposite the door, about 10 or 12 feet off, when the constable came out with a woman. When he came outside he let the woman go. He (witness) did not see anyone interfere with the constable in the execution of his duty, but he heard the accused say to the constable that if he came in again and interfered with his customers, he would put him out.

The accused was found guilty, and sentenced to pay a fine of 10s. or five days' imprisonment with hard labour.

From this sentence the present appeal was brought.

Mr. Molteno was heard in support of the appeal, and contended that the constable had no right to enter the canteen and effect the arrest without having first demanded admission in terms of Ordinance 78, section 19. On the facts, there was no evidence that the constable had been hindered in the execution of his duty.

Mr. Giddy, for the Crown, contended that a canteen was a public place within the meaning of section 5, sub-section 18, of Act 27 of 1882, and the constable was justified in entering the premises without previous permission; he was following a fugitive from justice.

Mr. Molteno in reply.

The Court dismissed the appeal.

The Chief Justice said: On behalf of the appellant it has been broadly contended that no police-constable has the right, under any circumstances, to enter a licensed public-house for the purpose of arresting a person found contravening any of the provisions of the Police Offences Act, 1882. The 18th section of the Act gives the power of arrest without warrant, but subject to the proviso that "no person shall be arrested or detained without warrant unless there shall exist

reasonable ground for believing that except by arresting the person offending he could not be found or made answerable to justice without delay, trouble or expense." Everything must therefore depend upon the question whether such reasonable ground did or did not exist in the present case. The appellant's counsel at first admitted that the constable who tried to arrest the woman in the "canteen" had reasonable ground for believing that the arrest was necessary in terms of the proviso, but on its being pointed out that the admission would be fatal to the appeal he somewhat modified his admission. The woman's name and address were unknown to the constable, she was very abusive both inside and outside the canteen, and the constable had every reason to believe that if she was not taken into custody a breach of the peace might ensue. He tried to apprehend her outside the canteen, and upon her taking refuge in the canteen he entered and arrested her there, but as he was taking her out the appellant rushed out from behind the counter and caught the constable by the arm, saying that he had no right to apprehend people in the canteen. This interference enabled the woman to escape and the question is whether the appellant was rightly convicted of hindering the constable in the execution of his duty. The conviction was clearly right if the power of arresting the woman in the canteen existed. As I have already shown, the constable could have arrested her outside the canteen. She took refuge in the canteen and the constable followed her through the open door. Was he obliged to obtain the appellant's consent before arresting her? In my opinion, the power to arrest being once established the right to enter the canteen for the purpose is beyond dispute and the appeal must be dismissed.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Scanlen & Syfret.]

REGINA V. SOGA MGIKELA. { 1898.
 { Oct. 18th.
Schoolmaster—Pupil—Correction—Assault
—Injury.

A schoolmaster's discretion in the punishment of his pupils should not be lightly interfered with, but chastisement which is obviously unreasonable or immoderate constitutes an actionable injury.

The nature of the offence for which the pupil has been punished is an important ingredient in deciding whether or not the punishment was unreasonable.

Appeal from a sentence passed upon the appellant by the Resident Magistrate for Prieska.

The accused, a schoolmaster, was charged with the crime of assault, in that upon or about the 5th day of September, 1898, and at or near Prieska, he did wrongfully and unlawfully assault one Betsy Colly, by striking her divers blows with a stick upon her head and arms, and other wrongs and injuries the said Soga Mzikela to the said Betsy Colly then and there did.

Betsy Colly, the child who was assaulted, gave the following evidence: I live with Mr. Hoffe at the police camp, and I attend the school kept by the accused. I was at school last Tuesday and I did not know my lesson—my English lesson—and the schoolmaster beat me. He beat me with a blaauwbosch stick; he struck me on the ear (scar exhibited); he only struck me one blow on the ear. He only struck me once and then on the ear, the stick he beat me with was thinner than the stick shown me (meaning one about three-quarter inch thick).

Cross-examined: I always learnt my lesson. The wound is not sore now, but it was very sore. It did bleed, but not a great deal. The stick was as thick as the lash of the whip (exhibited). My mother said the schoolmaster must beat me. The schoolmaster did not beat me for nothing; he had reason for beating me.

Antje, a child of ten, gave corroborative evidence.

Mr. Philip R. Hoffe gave the following evidence: I know the accused. I also know Betsy. The accused keeps a school, and Betsy is in my service. She works every morning, and when she can be spared she goes to school in the afternoons. Betsy attended school on Tuesday, the 5th instant, and she returned home about a quarter past five. I saw her when she returned and noticed that she had been crying, and had blood on her jacket. She had two spots of blood about the size of a shilling and one about the size of half a crown on her dress. I questioned her and she told me that the schoolmaster had beaten her. She voluntarily pulled off her jacket, and showed me her arms, which bore the marks of blows, the right arm was bruised from the wrist to the elbow, and the left arm over the place where she had lately been vaccinated, the marks had the appearance of having been inflicted with a stick, and not a thin one. The child's ear had been out, and was then much swollen, and was bleeding. She also had the mark of a blow on the back of the neck.

Cross-examined: The swelling on her right arm was not caused by vaccination, as she had been vaccinated on her left arm. I did not see her beaten. I should imagine from the appearances of the bruises that a stick as thick as the handle of the whip (exhibited) was used. Betsy was able to do her usual work on Tuesday afternoon, which is

minding the baby. I am not aware that she suffered much from the effects of the blows. I believe the girl to be all right now.

Christina, Betsy's mother, deposed that she knew nothing about the child having been beaten, and that if she deserved a beating she ought to have received it. She did not consider the schoolmaster had done wrong in beating the child. When the child returned home on Tuesday night there was nothing the matter with her, and she said her master had beaten her because she did not know her lessons properly.

By the Court: She saw nothing except the vaccination marks on the child's arm. She saw a scratch on the child's ear. She examined the child on account of the vaccination, and did not see any marks. The girl did not complain about a beating, but she heard others talking about it.

The accused was found guilty and sentenced to pay a fine of £2 or in default one month's imprisonment with hard labour.

The following reasons were given by the Magistrate: The evidence of complainant Betsy Colly and the witness Antje at the hearing of this case was far from satisfactory, leaving the impression that they were afraid to tell all they knew about the assault. The evidence of the witness for the defence was of a very unsatisfactory nature, and as she contradicted herself in her evidence, and is of a drunken, dissipated character, no reliance could be placed on what she stated. The evidence of Sergeant P. R. Hoffe was very clear, so clear in fact, that the Court deemed it unnecessary to call other evidence to prove the state the child was in when she returned from school. It was found difficult to get evidence of the assault from other coloured people attending the school, as accused is held in great fear by them.

The accused now appealed.

Mr. Buchanan was heard in support of the appeal, and contended that the punishment administered was moderate, and hence justifiable. A schoolmaster's discretion in punishing his pupils should not be interfered with. He cited *Patterson v. Nutter* (57 A.R., 820) in support of the proposition that in case of doubt as to whether a schoolmaster had used a reasonable discretion or not, the benefit should be given to the master. There was no evidence to support many of the statements made by the Magistrate in his reasons.

Mr. Giddy, for the Crown, was not called upon.

The Court dismissed the appeal.

The Chief Justice said: I quite agree with the appellant's counsel that Courts of law should not lightly interfere with the discretion of schoolmasters in the punishment of their pupils. A schoolmaster's position is at all times a difficult one; it is his duty to maintain discipline and in

the performance of this duty his temper is often sorely tried by unruly, disobedient, or wicked pupils. Courts of law should therefore not weigh too nicely the exact degree of punishment inflicted upon pupils, nor, as has been justly remarked by *Voet* (47, 10, 2), should they hastily presume that such punishment was dictated by improper motives. But it has always been held that there is a limit to the schoolmaster's discretion, and that if he exceeds that limit, if he inflicts chastisement which is obviously unreasonable or immoderate he commits an actionable injury. I quite agree with the American judge whose judgment has been quoted that the nature of the offence for which the child has been punished must be taken into consideration. A serious offence deserves a serious chastisement. It would be absurd to mete out the same punishment to a pupil committing some childish peccadillo as to one who is detected stealing, lying, or committing some more serious moral offence.

What was the offence in the present case? The poor child did not know her lessons. It does not appear that this was due to laziness on her part. She was employed as nurse in the forenoon, and was allowed to attend the school in the afternoon. If the appellant had only beaten the child on the arms or back there might be some excuse for him, but it is not denied that he gave her a blow with a stick on the ear with such force as to cause blood to flow. It is now contended that this blow may have been accidental, but that defence was not set up in the Court below. It is also contended that the Magistrate showed some animus against the appellant by importing into his "reasons" his knowledge of facts gained outside his Court. It would have been better if the Magistrate had confined himself to the evidence, which alone must guide this Court. Quite independently of the extraneous matter introduced into the case, I am of opinion that the punishment was excessive, and that the appellant was properly convicted. I trust that the effect of this judgment may not be seriously to injure his prospects in life, and that it may make him more careful in future. If he lost his temper on one occasion it does not follow that he may not be a successful schoolmaster hereafter.

The appeal must be dismissed.

Their lordships concurred.

[Appellant's Attorney, G. Montgomery Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), and Mr. Justice UPINGTON,
K.C.M.G.]

In re THE CAPE OF GOOD HOPE { 1898.
BANK, IN LIQUIDATION. { Oct. 17th.

Mr. Innes, Q.C., moved for the sanction of the Court to a compromise proposed to be effected by the official liquidators with one K. H. Mathom, of Pietermaritzburg, in respect of a guarantee of a debt incurred by the late G. A. Tilney, on condition that no statement of affairs shall be required, and that the terms of the compromise shall not be made public.

Mr. Innes said the application was an exceptional one, as the Court was asked to vary the order they had already made with reference to publication of the compromises. It would not, however, prevent the liquidators inquiring into the matter, and, in fact, they had already made very full inquiries, and found that the arrangement was a very fair one. The offer was made by the debtor's brother, one condition being that it should be accepted by the 31st instant.

The Court granted the order.

The Chief Justice said: It does not follow that because the Court has laid down a certain rule regarding debtors residing in this colony that they should follow the same rule in regard to debtors residing elsewhere. The liquidators may have great difficulty in following the debtor's assets in Natal, and suing him there. Seeing that the brother is willing to compromise, and the liquidators are satisfied that it is for the benefit of the estate, the Court will make the order.

Re VAN ZYL, A MINOR. { 1898.
 { Oct. 17th.

Mr. Watermeyer moved for authority to the Master of the Supreme Court to pay from money to the credit of the minor in the Guardians' Fund an annual allowance towards his maintenance and education.

The matter had been previously before the Court, and stood over for further information. The Master had reported that £70 per annum would be sufficient for the minor's maintenance and education. The minor was seventeen years of age, and the allowance would be required until he was twenty-one. The money in the Master's hands was not burdened in any way.

An order was granted in the terms of the Master's report.

FRASER V. JOHNSON AND OTHERS.

Mr. Innes, Q.C., moved for the issue of a commission to take the evidence in England *de bene esse* of Frank Johnson, one of the defendants.

Mr. Searle, who appeared for Fraser, consented, and applied for the issue of commissions to take evidence at Vryburg and at Port Beira. He suggested Mr. Vincent as the commissioner at Vryburg, and Lieutenant Walsh, British Consul, at Port Beira.

The applications were granted in each case.

Mr. Mackarness was appointed commissioner in London.

MCGRATH V. MCGRATH.

Mr. Sheil moved for leave to the petitioner to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

Referred to counsel.

NESBITT V. NESBITT.

Mr. Webber moved for an order extending the return day of the rule *nisi* granted by the Cironit Court for Aliwal North, whereby respondent was required to show cause in the Supreme Court on the 19th December, 1892, why a decree of divorce should not be made against him by reason of his failure to obey the order for the restitution to his wife of her conjugal rights.

In reply to the Chief Justice, counsel said he wished the time to be extended to November 30.

The Chief Justice: The order will be made extending the return day to November 30. The applicant will have to pay the costs of this application; there have been so many applications that the respondent certainly ought not to be saddled with these costs. Personal service if possible, failing which, publication to be made in the same way as the citation was published.

Ex parte LUBBE. { 1898.
 { Oct. 17th.

Minors—Landed property—Error in deed of transfer—Amendment.

Leave given a mother to act for her minor children in correcting an error in a deed of transfer.

This was the petition of Jacoba Wilhelmina Lubbe, mother of the minors A. J. and J. H. Lubbe.

The petition set forth that the minors were the registered owners of two twenty-fifth shares in the remaining extent of the farm Grootvallei, in the division of Clanwilliam, by a deed of transfer

passed in their favour by the executors of the estate of their late father, William Jacobus Lubbe.

The farm was divided during the lifetime of the minors' father, and the shares in the remaining extent were wrongly calculated. W. J. Lubbe should have received transfer of one-sixth instead of one-fifth share in the remaining extent. His children should only hold one-thirtieth share each, instead of one twenty-fifth share, as at present.

All the proprietors of the remaining extent have agreed to divide it afresh, in order to enable each to get transfer of the shares actually belonging to him.

The Registrar of Deeds, however, refused to allow the shares belonging to the minors to be dealt with unless authorised to do so by the Court.

The prayer was for an order authorising the petitioner to act for the minors in the division of the remaining extent of the farm, and to sign all powers of attorney and other documents necessary for that purpose. The minors filed affidavits, in which they alleged that they were aware of the error made in the deed of transfer, and that they approved of the proposed amendments.

The matter was referred to the Master, and he reported that as all parties concerned were agreed that an error had been made, he saw no objection to the application being granted.

Mr. Shell was heard in support of the application.

The order was granted as prayed.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), and Mr. Justice BUCHANAN.]

ADMISSIONS.

Ex parte SMUTS. { 1898.
Oct. 24th.

Mr. Shell moved for the admission of Mr. Francois John Smuts as an attorney and notary public.

Mr. Smuts took the oaths, and was duly admitted.

Ex parte SMUTS.

Mr. Jones moved for the admission of Mr. Marthinus Wilhelmus Smuts as an attorney and notary public.

Mr. Smuts took the oaths, and was duly admitted.

COHEN V. PRACH. { 1898.
Oct. 24th.

Case pending in Supreme Court—Application for removal to High Court refused.

Mr. Searle, on behalf of defendant, applied for the removal for trial of the said suit from this Court to the High Court of Griqualand.

Mr. Searle stated that the trial of the suit in the Supreme Court would occasion a great loss of time to the defendants, who were carrying on a large wholesale business at Kimberley. The removal of their books to Cape Town would also cause much inconvenience.

Mr. Innes, Q.C., for the plaintiff, claimed that he was entitled to choose his own forum, and objected to the removal of the case from the Supreme Court.

Mr. Searle said the amount at issue was very small—about £38—and it was a case which would be settled without delay and would not be likely to result in an appeal. While admitting that the plaintiff was as a rule entitled to choose his own forum, he maintained that where the balance of convenience was in favour of removal, it might be granted, and quoted the case of *Roikman v. Woodrow* (Eastern Districts Court's Reports. Vol. IV., p. 84), in which Mr. Justice Buchanan had given judgment in favour of the removal of a case from the Eastern Districts Court to Graaff-Reinet, where the applicant's witnesses were. In the present case the witnesses for the defence resided within the jurisdiction of the High Court of Kimberley.

Mr. Innes submitted that the bulk of the evidence must be obtained from Beaufort West, which was mid-distant between the two Courts. Further, the Supreme Court term commenced sooner than that of the High Court of Griqualand West.

The Chief Justice: Are the plaintiffs prepared to admit the extracts from the books?

Mr. Innes: Yes, my lord.

The Chief Justice: The general principle is that the plaintiff is entitled to select his own forum, and the Court has always required evidence that it would be for the benefit of the parties that there should be a removal before such an order was made, at all events at the instance of the defendant. Now there are obvious advantages in having this case tried here. The attorneys have already been instructed, and they are fully cognisant of all the facts of the case, and counsel have also been instructed. If the case is removed to Kimberley, attorneys and counsel at Kimberley will have to make themselves acquainted with all the facts. Again, as to witnesses, it does not appear from the statement of the defendants that

they have many witnesses to send. Their main objection lies with the books, which it would be inconvenient to take to Cape Town. That, however, is set aside by the plaintiff consenting to admit extracts. On the whole, we think there is not sufficient cause shown for the removal. There will be no order on the present application. Costs will abide the result.

Mr. Justice Buchanan concurred.

ESTATE OF LATE WILLIAM FREEMANTLE.

Mr. Buchanan applied for authority to the Registrar of Deeds to issue a certified copy of a mortgage bond for £94, passed by one Jan Adonis in favour of the said Freemantle, hypothecating portion of erf No. 11, situate in Graaff-Reinet, the original having been lost or mislaid.

The order was granted.

MOGRATH V. MOGRATH.

Mr. Sheil moved for a rule nisi requiring the petitioner's husband to show cause why she shall not be admitted to sue him *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce.

The order was granted, to be made returnable on the last day of the next term.

NESBITT V. NESBITT.

Mr. Weeber moved for direction of the Court as to the date by which the respondent is to restore to his wife her conjugal rights in respect of the rule nisi granted by the Circuit Court for Aliwal North, and extended by this Court to the last day of the November term.

The Court directed that the date should be fixed at November 21.

FESTER V. FESTER.

Mr. Sheil applied for a rule nisi requiring the petitioner's wife to show cause why he shall not be admitted to sue her *in forma pauperis* in an action for divorce, by reason of her alleged adultery.

The order was granted, returnable on the 2nd of November.

Ex parte BEHRENS. { 1898.
Oct. 24th.

Edict—Leave to sue by.

The Court granted a petitioner leave to sue her husband by edictal citation in an action for restitution of conjugal rights where the husband had deserted his wife in 1871.

Personal service was ordered.

This was the petition of Catherina M. A. J. Behrens, of Peddie. The petitioner was married to Jacobus Martines Behrens, at Riebeck East, in the division of Albany, on the 17th April, 1849, in community of property. Ten children were born of the marriage, nine of whom survive all majors.

The petitioner alleged that without any lawful excuse or cause her husband maliciously deserted her and left his home on or about 18th December, 1871, being at present presumed to be in the neighbourhood of Pretoria, beyond the jurisdiction of the Court.

That since the date of the desertion the petitioner supported her children out of her own earnings until they were severally able to earn their own livelihood.

The petitioner was desirous of suing her husband by edict for restitution of conjugal rights, and failing his return, for divorce, by reason of his malicious desertion, and for a forfeiture of his share in the community of property.

The prayer was for leave to sue by edict.

Leave was granted to sue as prayed, personal service to be effected. The citation and interdict to be served together. The process to be returnable on 30th November next. Failing personal service, a fresh application to be made to the Court showing some grounds for supposing that the defendant was in Pretoria.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

Ex parte NICOLAY. { 1898.
Oct. 24th.

Interdict—Fraud—Edict—Leave to sue by. Where conduct amounting to fraud was alleged against a defendant the Court granted an interdict restraining him from parting with his property pending the decision of an action instituted against him.

This was a petition of Helen Pauline Nicolay. It appeared from the petition that the petitioner was married to her present husband, Hugo Carl George Nicolay, a clerk in the office of the Treasurer of the Colony, on the 11th February, 1898, she being then the widow of the late Dr. Gustav Messow.

That she was then the holder of certain mortgage bonds to the amount of £2,450, representing loans made by her to various persons out of moneys which were her sole and separate property, she being married by ante-nuptial contract, excluding community and the marital power.

That in March last petitioner's husband obtained six months' leave of absence, in order to obtain medical advice in Germany, and it was arranged that she should accompany him.

That he represented to her that he had an overdraft of £1,500 at the Bank of Africa, and urged that she should advance him £2,000 to repay this amount and provide funds for the journey to England, offering to pay her £10 a month as interest. At first petitioner refused, but ultimately, upon his urgent request, agreed and pledge the said bonds to the Bank of Africa for an advance of £2,000 on them. This amount was paid over to petitioner's husband, and she signed a promissory note in favour of the bank, falling due on the 10th September last, on which day he undertook to repay the money.

On 16th March last petitioner and her husband left for England and arrived in London on 10th April, her husband having treated her with kindness up to that date.

On the 11th April he left her, saying he was going to Berlin to consult an aurist, and would return in about a fortnight. He did not, however, return, but wrote to her on 1st May, expressing his determination not to return to her, and at the same time promising to pay her the £10 a month, the interest on the loan.

Since then the petitioner has neither seen nor heard from her husband. She returned to the Colony, and in due course the bill in the hands of the Bank of Africa fell due, and was renewed by her.

The petitioner alleged that she had ascertained by inquiry at the bank that her husband had no overdraft, and did not even deal with the bank when the transaction above mentioned took place.

That her husband was the owner of certain landed property, being part of the divided estate Hopeville Lodge, in Cape Town, the same being mortgaged for £700.

That the property brings in a rental of £7 per month, which is paid to Captain H. A. P. Burmeister, who holds Nicolay's general power of attorney.

That Mr. B. Muller and Mr. G. W. Thompson hold property belonging to petitioner's husband.

The prayer was for an order :

1. Granting petitioner leave to sue her husband by edict for recovery of the said debt, and for instructions as to service of process on him.

2. Restraining Burmeister, Muller, and Thompson from parting with any goods or money in their respective possession belonging to petitioner's husband pending the result of the action.

3. Restraining the Registrar of Deeds from passing transfer of the property pending the result of the action.

Mr. Tredgold was heard in support of the petition.

The Court granted the application.

The Chief Justice said : It is an unusual course

to restrain a defendant from parting with property, but the affidavit discloses what is a clear case of fraud if true, and in such a case the Court would have to restrain the defendant from parting with his property. Leave will be granted to sue the defendant by edictal citation, personal service if possible, failing which service to be effected upon Captain Burmeister, and process to be published once in the "Government Gazette," and to be returnable on the 12th January; in the meantime an order will be granted restraining the defendant from parting with any of his assets in the Colony, including Hopeville Lodge, in Cape Town, and the furniture in the possession of Messrs. Muller & Thompson; this order to be served upon the Registrar of Deeds and upon Captain Burmeister.

[Petitioner's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

(IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), and Mr. Justice UPINGTON,
K.C.M.G.]

HORN V. HORN. { 1893.
Oct. 31st.

Pauper—Leave given to sue *as*—Rule *nisi* made returnable twelve months after the date of the order.

This was an application for a rule *nisi* calling (upon the respondent to show cause why applicant her husband) should not be permitted to sue her *in forma pauperis* in an action for restitution of conjugal rights.

The petitioner alleged that his wife had maliciously deserted him, that he was desirous of suing her for restitution of conjugal rights, and that he was not worth £10.

The affidavit of two householders was attached and was to the effect that as far as they knew the petitioner was not worth £10.

Mr. Graham was heard in support of the application, and informed the Court that the matter had been referred to him, and that he had placed a special endorsement on the petition to the effect that further information on the subject was necessary. Subsequently he received a lengthy affidavit, which went more fully into the circumstances, and upon receipt of that he certified.

In reply to Mr. Justice Upington, counsel said he believed that Horn was a farmer. He was informed that the man was in a very poor position of life.

Mr. Justice Upington said he did not think he ever saw such meagre information in a petition. He had looked through all the papers. It was a remarkable case in more ways than one, because these people were married only in February last.

The Chief Justice: These pauper divorce cases are really becoming too frequent. People just get married for the purpose of being divorced apparently. Here are these people married in February, and they want to be divorced the same year. The applicant does not state in his petition the exact date on which his wife left him; he merely states that he is desirous of instituting an action for divorce on the ground of malicious desertion, and does not state when or where the desertion took place.

Mr. Graham said that if their lordships desired that information he could procure it.

The Chief Justice: The only way to check these actions is to put some obstacles in the way. These people are only just married, and they may come together again. We shall give them twelve months to consider it. You may take the rule *nisi*, returnable twelve months hence. If in the meanwhile the petitioner wishes to proceed with his action, not as a pauper, but in the ordinary way, he may do so; but he cannot sue as a pauper until twelve months have expired.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

SONKER BROS. V. HUMBLY. { 1893.
Nov. 1st.

Unsatisfied judgment — Writ of civil imprisonment — Magistrate's Court costs — Act 20 of 1856, Section 20.

B. was unsuccessful in an appeal from a judgment of the Resident Magistrate of Cape Town.

The costs of the appeal amounted to £10 6s. 11d.

Execution issued and a return of nulla bona was made by the Sheriff.

Held, in an application for a writ of civil imprisonment against B. upon the unsatis-

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fied judgment, (1) that the Magistrate's Court would have had jurisdiction to issue a decree of civil imprisonment upon an unsatisfied judgment of the Supreme Court on appeal; (2) that the Supreme Court had concurrent jurisdiction in respect of its own order.

The Court granted a decree of civil imprisonment but with Magistrate's Court costs only.

This was an application for a writ of civil imprisonment on an unsatisfied judgment of £10 6s. 11d., being the costs of an appeal decided against the present defendant, together with £1 8s. 8d., costs incurred in issuing the writ, the return on which was *nulla bona*.

Mr. Searle was heard in support of the application.

Mr. McLauchlan, for the defendant, admitted the claim for £10 6s. 11d., but contended that the writ should have been sued out of the Resident Magistrate's Court. Under Act 20 of 1856, section 20, a defendant can only be imprisoned at longest for three months, whereas under a Supreme Court writ he may be imprisoned for any period. Counsel referred to Rule 40, schedule B of the Act, and to the form of warrant there given.

Mr. Searle, in reply, referred to *Murray & St. Leger v. Armour* (2 Sheil, 110).

The Chief Justice, after remarking that if the Magistrate's Court had jurisdiction it was only fair that Magistrate's Court costs should only be allowed, said: Upon the question of jurisdiction which has been raised, we are of opinion that according to the sections of the Act cited, the Magistrate's Court would have jurisdiction to issue a decree for civil imprisonment upon an unsatisfied judgment of the Supreme Court on appeal. At the same time we are of opinion that the Supreme Court has concurrent jurisdiction in respect of its own order, and therefore we shall be prepared to issue the writ, but we shall only give Magistrate's Court costs. If there is a further defence, and the respondent is unable to pay, Mr. McLauchlan will be heard upon that point now.

Mr. McLauchlan called the defendant, but found that he was not present.

The Chief Justice: It would require very strong evidence of his inability to pay to satisfy the Court. It was he who set the law in motion. Judgment was given against him, and he needlessly appealed against it, incurring further costs. However, you can apply again if you have clear evidence that he cannot pay. In the meantime the Court will grant a decree of civil imprisonment with Magistrate's Court costs. A further order will be made that the period of imprison-

ment shall not extend beyond the period provided by section 20 of Act 20 of 1856.

[Applicant's Attorney, D. Tennant, jun.; Respondent's Attorney, J. Hamilton Walker.]

GORDON MITCHELL AND CO. V. KUPER. { 1898.
Nov. 1st.

Mr. Barber moved for provisional sentence for £196 11s. 10d., less £50 paid on account, on a promissory note due on the 1st of May, 1898.

Granted.

WESSELS V. LA GRANGE.

Mr. Maskew moved for provisional sentence for £418 16s., balance of a mortgage bond originally passed for £450, with interest from the 24th of August, 1892. He also applied to have the property declared executable.

The application was granted.

BELL AND ANOTHER V. GARRMAU.

Mr. Graham moved for the final adjudication of the defendant's estate, the provisional order for which was granted on the 23rd of May, 1898.

Granted.

LEWIS V. WOODFORD.

Mr. Tredgold moved for judgment under rule 329 for £54 6s. 11d., goods sold and delivered.

Granted.

MARKHAM V. MORKEL.

Mr. Barber moved, under rule 329, for judgment for £5 5s., for goods sold and delivered, and costs of suit.

Granted.

RUTTER V. VAN EYK AND ANOTHER.

Mr. Graham moved for judgment under rule 329 for £14 8s. 6d., for goods sold and delivered. The amount was due in December, 1891. Defendant had sent a cheque for the sum on October 14, but it was dishonoured at the bank on presentation.

The order was granted.

CLOETE V. MYBURGH.

Mr. Shell moved, under rule 329, for judgment for £32 10s.

Granted.

CELLIERS V. SAS.

{ 1898.
Nov. 1st.

Stolen money—Judgment under Rule 329.

Mr. Webber moved for judgment under Rule 329, for £40 with interest from 31st March, 1890; £25 with interest from 30th November, 1892, and £20 with interest from 31st December, 1892, being money stolen by the defendant from the plaintiff on or about the dates from which interest was claimed at 6 per cent. per annum.

The defendant was convicted at the Circuit Court held at Colesberg on the 3rd January, 1898, and personal service was effected on him in the Colesberg gaol.

Judgment was granted as prayed.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

REHABILITATIONS.

The following rehabilitations were granted on motion from the Bar: George Adolph Meyer, Carl Johannes Grove, jun., and Daniel Hendrik Rossouw, jun.

WASSERFALL V. WASSERFALL. { 1898.
Nov. 1st.

This was an action for restitution of conjugal rights instituted by Mrs. Fredrika Catharina Wasserfall (born Dykman) against her husband, Henry William Wasserfall, on the grounds of his malicious desertion.

The declaration alleged that the parties were married in community of property at Cape Town on the 5th August, 1884.

That in the year 1886 the defendant unlawfully and maliciously deserted the plaintiff, and deprived her of her conjugal rights, and refused, and still refuses, to restore to her the same, though frequently requested to do so.

The prayer was for:

(a) An order compelling the defendant to restore to the plaintiff her conjugal rights, and to return to and cohabit with her, and failing compliance with such order within such time as may be determined by the Court,

(b) A decree of divorce on the grounds of malicious desertion dissolving the bonds of marriage now subsisting between the parties.

(c) Further relief, with costs of suit.

Mr. Shell appeared for the plaintiff; the defendant was in default.

Mr. N. Lacy, of the Colonial Office, produced the original marriage certificate.

Mrs. Fredrika Catharina Wasserfall, the plaintiff, deposed that after their marriage she lived with her husband in Caledon-street. He ill-treated

her, and in consequence she left him and went to her mother's for protection. Defendant came there on one occasion and dragged her about eighty yards along the ground. People came to her assistance, and she went into a fit. She was carried to her mother's house, and was for fourteen days in convulsions. She did not return to her husband, because he had no home for her. He had sold everything, and since then she was obliged to support herself up to the present. Her husband was now in England she believed. She had tried to find out where he was, but had not written to him.

The Chief Justice: You may take a decree for the restitution of conjugal rights with costs; defendant to return to or receive the plaintiff on or before the 12th of January next, failing which take a rule nisi calling on the defendant to show cause on the 1st of February why the decree of divorce should not be granted with costs, personal service if possible; failing which the rule to be served in the same manner as the summons.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissan.]

GRANELLI V. GRANELLI. { 1898.
Nov. 1st

This was an action for divorce brought by the plaintiff by reason of his wife's adultery. The plaintiff also prayed that the defendant forfeit all benefits under the marriage in community, and that he should have the custody of the children.

Mr. Molteni appeared for the plaintiff, the defendant was in default.

Alexander Granelli deposed that he was married to the defendant on the 18th of January, 1885. They lived happily for some time. He left Cape Town to see a friend in Kimberley, and was absent fourteen days. When he came back he found all the goods had been taken out of the shop, and nothing in the place. He saw a man coming out from behind the partition leading to the bedroom. He asked his wife who the man was, and she gave him no answer, but began to cry and went away. She returned next day, but witness said he would have no more to do with her. She went to live at the corner of Castle and Bree-streets with a man whom he did not know. The child born of the marriage was aged about seven.

By the Court: The child was with his wife. His occupation was that of a shopkeeper; he was an Italian. There was only a shilling in the place when he returned from Kimberley. He heard that his wife was living with a man named Jimmy O'Reilly.

Mr. Norman Lacy proved the marriage.

Jario Montenari, an Italian, who spoke English imperfectly, stated that he kept a shop into which

plaintiff's wife was in the habit of coming. He had heard her tell his wife that she was living with a man named Jimmy, whose other name he did not know.

Christina Isaacs, 8, Cross-lane, off Waterkant-street, deposed that she took charge of two children of Jimmy O'Reilly and the defendant, who went by the name of Mrs. O'Reilly. O'Reilly and defendant had boarded in her house for some time as man and wife, and now they lived together in Cobern-street.

A decree was granted as prayed.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne.]

CHAMBERS V. CHAMBERS. { 1898.
Nov. 1st.

This was an action for divorce, by reason of the defendant's adultery with Alfred Bevern. The parties were married on the 4th of September, 1890, and in the year 1898, more particularly in the month of July, it was alleged that defendant committed adultery with Bevern.

Mr. Graham appeared for the plaintiff.

The defendant, who was in court, admitted the marriage.

Richard Chambers, the plaintiff, deposed that after their marriage he resided with his wife in Cape Town. He knew Alfred Bevern, and after the case of Bevern v. Bevern, heard in the Supreme Court, he instituted these proceedings. During July of this year he was not staying at the D'Urban-road Hotel with his wife. He had never stayed there. There was one child of the marriage, but he did not claim its custody.

The Chief Justice asked Mrs. Chambers if she had come to defend the action.

The defendant said she had come to ask for the custody of the child, and that she might be allowed to carry on the business which she was now carrying on, and which her husband insisted in taking from her.

The Chief Justice asked what was the business.

The plaintiff said it was a confectionery business, and it was in his name. She ran him into a lot of debt, to pay which he wanted to sell the business.

The Chief Justice: What is your business?—I am a billiard marker.

Then she conducts the business?—Yes.

Who buys the articles?—My wife does.

Then should she not be allowed to continue it?

—No, sir; I am responsible for everything she gets.

You won't be responsible after the divorce. If she will pay the debts you will let her keep the business?—Yes.

The defendant said she could not pay the debts contracted previously to the plaintiff's leaving her,

Plaintiff, in reply to Mr. Graham, said that his wife was leaving Cape Town with Mr. Bevern. It was through drink, he added, that this occurred. His wife had taken to drink.

Defendant denied that this was true.

The Chief Justice said he did not see how they could make any order with regard to the business.

Henry Hamilton, proprietor of the hotel at D'Urban-road, deposed that the defendant stayed at his hotel with Bevern, who introduced him to her as Mrs. Bevern. They occupied a bedroom in the hotel.

A decree was granted as prayed.

[Plaintiff's Attorney, J. Hamilton Walker.]

WOLFF V. WOLFF. { 1893.
Nov. 1st.

Pauper—Action for restitution of conjugal rights.

In a pauper suit for restitution of conjugal rights, in which it appeared that the plaintiff's father was in a position to pay the costs of an action brought in the ordinary way; the Court granted a decree of restitution of conjugal rights, but ordered that the leave given to sue in forma pauperis should not apply to any subsequent proceedings.

This was an action instituted by Mrs. Rayner Wolf against her husband, Michael C. F. Wolff, for restitution of conjugal rights, failing which for divorce, by reason of the defendant's malicious desertion.

The declaration alleged:

1. That the plaintiff was lawfully married in community of property to the defendant before the Resident Magistrate for Simon's Town, at Simon's Town, on the 6th day of April, 1892, and that the said marriage was still in full legal force and effect.

2. That from and after the time of the said marriage the defendant wrongfully and unlawfully refused, and still refuses, to cohabit with the plaintiff his wife, and thereafter, in or about the month of August, 1892, he wrongfully, unlawfully, and maliciously deserted the plaintiff and refused, and still refuses, to return to her and to restore to her her conjugal rights, though frequently requested to do so.

The plaintiff claimed:

(a) An order compelling the defendant to restore to her her conjugal rights, and failing compliance with such order within such time as to this honourable Court might seem meet,

(b) A decree of divorce.

(c) Alternative relief, with costs of suit.

No plea was filed, the defendant being in default.

Mr. Sheil appeared for the plaintiff.

Mr. N. Lacy, of the Colonial Office, produced the original marriage certificate.

Mrs. Rayner Wolff, the plaintiff, deposed that after being married she did not live with her husband. She believed he had a home provided for her before their marriage, but on returning from Simon's Town he told her to go to her own home and remain there for a few days until he got everything in readiness. It was two months afterwards, she thought, before her father learned that she was married.

The Chief Justice: Is Moses Fletcher your father?—Yes.

What is his business?—He is a grocer.

And is this lady suing as a pauper?

Mr. Sheil: Yes. She has no means.

The Chief Justice: It is most extraordinary. Her father, Moses Fletcher, is one of those who make an affidavit that she has no money.

The Plaintiff: It is only too good of him to keep me and give me food while my husband is away.

By Mr. Sheil: While living with her father she wrote several letters to her husband asking him to take her away, and he promised to do so, but never did. Her father wrote to him in August, 1892, and to that he made a similar promise. Then he went away. She had never heard of him since. He had never given her a penny, and she did not know where he was now.

By the Chief Justice: He never lived with her as her husband.

Mr. Justice Upton: Was she of age when she married?

Plaintiff said she was, but her husband was not.

Mr. Justice Buchanan: He represented himself as twenty-two.

The Chief Justice: In this case the rules of the Court may have been complied with in the letter, but not in the spirit. Here is a father well able to maintain his daughter, and well able to pay the costs of the suit instituted, and yet he signs the certificate which shows that his daughter is a pauper.

Mr. Sheil said he had made inquiries as to whether the plaintiff had any means and found that she had none.

The Chief Justice: I think in a case of this kind the father should pay the costs.

Mr. Sheil: The plaintiff is a major.

The Chief Justice: Of course she is a major. Yet certainly it is not the spirit of the rules of the Court that, under such circumstances, a plaintiff should sue as a pauper.

After further argument,

The Chief Justice said: You may take the decree for restitution of conjugal rights. The defendant must receive, or return to the plaintiff on the 30th November next, failing which take a rule nisi, returnable on December 12, calling upon him to show cause why a decree for divorce should not be granted, the rule to be served in the same manner as the summons, but leave to sue *in forma pauperis* does not apply to any further proceedings.

[Plaintiff's Attorney, J. Hamilton Walker.]

DIXON V. DIXON. { 1898.
Nov. 1st.

This was an action by the plaintiff against his wife for restitution of conjugal rights, failing which for divorce, on the grounds of malicious desertion.

Mr. Graham appeared for the plaintiff; the defendant was in default.

Dr. John Francis Dixon deposed that he was a medical practitioner residing in Cape Town. He was married to the defendant in St. Mary's Parish Church, Leicester, on the 16th September, 1876. There were two children, girls, of the marriage, Pauline, seventeen, and Florence, thirteen and a half. After their marriage they resided in England until 1889, when they came to the Colony, where they had since resided. They lived happily until rather more than a year ago, when his wife took some aversion to him for no reason. They occupied separate bedrooms, and there was an estrangement. He sent the two children Home on the 22nd of February to be educated. He had no knowledge that his wife accompanied them until 6.30 on the evening on which they sailed for England. He was detained at the hospital, and could not see the children off. He found a letter on his table from his wife saying it was impossible for her to return. He subsequently paid for her passage, when he found that the ticket had not been paid for. She got it without any difficulty at the Castle office, as they knew the children were going Home, and believed it was all right. He made efforts to induce her to return. He had forwarded £140 to his brother, a solicitor in Wakefield, to pay for the expenses of her return, but she declined to accept it. He would certainly be willing to receive her if she returned. He had never given her any occasion to leave him. The eldest child was with his sisters, the other was with his wife, and considering the state of the child's health and her desire to be with her mother, he would not press for her custody. He was providing for the children at present, and was prepared to continue to do so.

The Chief Justice: Take a decree for the restitution of conjugal rights, defendant to return to plaintiff on or before 12th January next, failing

which, take a rule nisi calling on the defendant to show cause, on the 1st of February, why a decree for divorce should not be granted, and a decree for the forfeiture of all rights conferred upon her by the marriage settlement, the rule to be personally served on the defendant.

[Plaintiff's Attorney, C. C. Silberbauer.]

ESTATE OF FERNANDO FERNANDEZ.

Mr. Moltano moved to make absolute the rule nisi authorising the Master of the Supreme Court to accept and file the death notice of the said Fernandez, master of the schooner Maria Fredrika, which left Table Bay for St. Helena Bay on the 10th of June last, and is supposed to have been lost with all hands on the said voyage.

Counsel said the rule nisi was granted on the 24th of August, and published as ordered by the Court. The Court asked him upon that occasion whether the Maria Fredrika was insured, and upon the instruction which he then had he said that she was not. But since that time a letter has been received from the owners stating that at the time of the loss the vessel was insured in the South British for £300, which has been settled. The cargo was not insured.

The Chief Justice: Very well, take the order.

ABRAMS V. ABRAMS.

Mr. Sheil moved to make absolute the rule nisi for a dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights, and for an order giving the custody of the minor child to the mother.

The Chief Justice: The rule will be made absolute.

FRASER V. JOHNSON AND OTHERS. { 1898.
Nov. 1st.

Mr. Searle applied for the appointment of a commission to take the evidence of one John Saunders, a witness for plaintiff, at Gaborones instead of at Vryburg, as already authorised, in the Bechuanaland Protectorate.

Mr. Searle said it had been ascertained since the commission had been authorised that the witness, who was in the Bechuanaland Border Police, had been sent from Vryburg to Gaborones.

The application was granted, Mr. W. H. Surmon being appointed commissioner.

GRAHAM V. GRAHAM.

Mr. Graham moved to make absolute the rule nisi for a dissolution of the marriage subsisting

between the parties by reason of the respondent's failure to obey the order for restitution to his wife of her conjugal rights.

The application was granted as prayed.

In re CAPE STOCK-FARMING COM- { 1898.
PANY, IN LIQUIDATION. { Nov. 1st.

Mr. Shell presented the following report of the official liquidator for the sanction of the Court:

Your liquidator has to report to your Honourable Court as follows:

1. That the London liquidators have obtained in the High Court of Justice an order for a further call of £1 10s. per share (as per copy order annexed marked A).

2. That the deficiency necessitating this further call is explained in the statement annexed marked B.

3. That your liquidator therefore begs that your Honourable Court will sanction such further call of £1 10s. on the Colonial shareholders of the said company, payable forthwith.

C. I. BRUGMAN, Official Liquidator.

The report was presented to the Court on the 26th September last, when it was ordered to be open for inspection at the office of the Master of the Supreme Court for a period of fourteen days, and a copy thereof at the office of the liquidator for a like period.

Notice of the rule to be given by publication in the "Government Gazette," "Graaff-Reinet Advertiser," and "Eastern Province Herald." These orders had been complied with, and no objections had been raised by shareholders.

The Court confirmed the report.

[Attorneys for the Liquidator, Messrs. Van Zyl & Buissinac.]

Re GEM GOLD-MINING COMPANY.

Mr. Graham presented the second and final report of the official liquidator.

An order was made dissolving the company, to be published in the "Government Gazette."

ESTATE OF THE LATE WILLIAM JONES, SEN.

Mr. Watermeyer moved to make absolute the rule nisi, issued under the Titles and Derelict Lands Act, for transfer to the said estate of certain ten plots of ground, situated near the beach at North End, Port Elizabeth, the same having been purchased and paid for by the said Jones in 1877, but never transferred.

The order was granted making the rule absolute.

WILLIAMS V. WILLIAMS.

Mr. Tredgold moved to make absolute the rule nisi for a decree of divorce by reason of respondent's failure to obey the order for restitution to her husband of his conjugal rights, and for an order giving the custody of the child of the marriage to the father.

The order was granted.

PRICE V. PRICE.

Mr. Currey moved to make absolute the rule nisi admitting the applicant to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce.

The rule was made absolute.

DUNNING V. MELLISH.

Mr. Innes, Q.C., applied on behalf of the plaintiff for the appointment of a commissioner to take the evidence of certain of his witnesses in the said suit at Johannesburg, South African Republic.

The application was granted, Mr. J. J. Auret to act as commissioner, and failing him, Mr. J. P. Solomon.

Re ALIWA! NORTH BOARD OF EXECUTORS TRUST AGENCY COMPANY, LIMITED.

Mr. Molteni presented the report of the official liquidator. He applied that the report should lie fourteen days for inspection in the Master's Office, and also, at the suggestion of the official liquidator, at the Resident Magistrate's Office at Aliwal North. He further applied to have one publication in the "Gazette" and in a local paper, the "Northern Post."

An order was granted as prayed.

Ex parte PINN AND OTHERS. { 1898.
 { Nov. 1st.

Derelict Lands Act—Attachment—Rates—Sale—Error.

Where land had in error been attached and sold under the Derelict Lands Act, 1881, to pay Municipal rates which were supposed to be due, but which as a fact were not due, the Court, all parties consenting, allowed the purchaser and the High Sheriff to consent to the cancellation of the sale.

This was the petition of (1) William Pillman Pinn, in his capacity as the Town Clerk of Port Elizabeth; (2) of John Scrimgeour, of Port Elizabeth; and (3) of William Wilson, in his capacity as secretary of the Perseverance Building Society of Port Elizabeth.

The facts are these :

The Court recently, on the application of the first named petitioner, caused to be attached and sold a large number of lots of ground situate in Port Elizabeth, under the provisions of the Titles Registration and Derelict Lands Act, in order to satisfy the rates alleged to be due and owing in respect thereof to the Municipal Council of Port Elizabeth.

Among the lots thus attached and sold was a piece of ground measuring 12 square roods and 27 by 52 square feet situate in Kirkwood-street, Port Elizabeth, being the remaining extent of the lot No. 19 of the lots Nos. 18 and 19 which were transferred to George Young, who is at present the registered owner of the remaining extent of lot No. 19 and of the lot No. 18, on the 22nd October, 1878.

At the time of the sale, the remaining extent of the lot No. 19 was along with lot 18 mortgaged to the Perseverance Building Society of Port Elizabeth for the sum of £400.

The remaining extent of lot No. 19 registered in the name of George Young, was included in the petition for attachment and sale and was attached and sold in error, no rates being overdue by Young thereon.

The error arose from the fact that Young had sold and transferred a portion of the lot 19 to one Robertson, who had failed to pay the rates thereon, and it was this portion which was intended to be dealt with and not the remainder of lot 19 the property of Young.

Seringeour purchased the piece of ground registered in Young's name at the High Sheriff's sale in trust for his minor son, but no transfer was passed.

The available surplus of the purchase price was tendered to the Perseverance Building Society as mortgagees of the said piece of ground and adjoining lot No. 18, but at the date of the petition they had not accepted the same.

The mortgagees did not know until they were advised of the surplus aforesaid that part of the ground mortgaged to them by Young had been attached and sold.

The petitioners were desirous that matters should be restored to the position in which they were prior to the sale, so far as the said property was concerned, provided the Court would permit Seringeour to be a party to the cancellation thereof, and would direct the High Sheriff also to be a party to the cancellation, and to the withdrawal of the attachment.

Young had been put to no expense, but the Building Society would be materially prejudiced if the ground sold were lost by transfer to Seringeour.

The petitioners alleged that they were prepared to arrange as between themselves the settlement of the amounts paid in respect of purchase price, transfer duty, and other items.

The prayer was for an order permitting the petitioner Seringeour to consent to the cancellation of the sale to him in trust as aforesaid, and to make and declare the necessary solemn declarations to that effect if need be, and also to direct the High Sheriff or other proper official to also, if required, consent to the said cancellation, make the necessary declarations to that effect, if need be, and withdraw the attachment imposed upon the said piece of ground.

Mr. Searle was heard in support of the application.

The Chief Justice : There has been a gross blunder on the part of somebody, and it is not the first blunder of a similar character which has been made. However, as all parties consent, you may take the order.

[Petitioners' Attorney, G. Montgomery Walker.]

Ex parte STRASHEIM. { 1898.
Nov. 1st.

Derelict Lands Act—Application under—
Rule nisi.

This was the petition of the Rev. Pieter Adam Strasheim, minister of the Dutch Reformed Church at Wynberg.

On the 4th November, 1814, the following property was granted to Johan Michiel van Helsing, viz., certain piece of perpetual quit-rent land called "Bokkeman's Kloof," situate in the Cape Division adjoining the farm Kroenendal between Hout's Bay and Orange Kloof.

On 5th February, 1835, the property was transferred to John Francis Manbert who reserved one morgen and fifty square roods for the use and on behalf of the Wynberg and Rondebosch Christian Instruction Society.

A diagram of this extent was framed and attached to the deed of transfer in favour of Albertus Petrus Myburgh (the subsequent purchaser of Bokkeman's Kloof) on the 17th September, 1851.

Myburgh only received transfer of the remaining extent, and according to the practice in the Deeds Office in those days, a remaining extent could be transferred before the deducted portion.

From the plans in the Registry Surveyor's office it was clear that this deduction was never laid down; but a pencil tracing was shown pointing out that this deduction was to be laid down, and the subsequent transfers excluded this extent of one morgen and fifty square roods.

The Wynberg and Rondebosch Christian Instruction Society ceased to exist, and ceded all their rights to the Dutch Reformed Church at Wynberg.

The proprietor of the remaining extent has always acknowledged the right of the Dutch Reformed Church at Wynberg, and still acknowledges it, and the Church have continuously occupied this land ever since.

The prayer was for an order authorising the Registrar of Deeds to pass transfer to the Dutch Reformed Church, Wynberg.

Mr. Tredgold was heard in support of the application.

The Chief Justice said this was a Chambers motion. The order would be made, but in future the Act should be observed.

The Chief Justice: Take a rule calling on all persons having or pretending to have any title to the land in question to appear on the last day of this term to establish their claims, or be for ever debarred therefrom, the rule to be published once in the "Zuid Afrikaan."

On the return day the rule was made absolute.

[Petitioner's Attorney, Gus. Trollop.]

REGINA V. KAPLAN.

1898.
Nov. 1st
& 9th.

Indictment—Defeating justice—Contempt of Court—Attempt to commit a crime—Inciting another to commit a crime—Conspiracy—Principals—Overt act.

It is an indictable offence to defeat the course of justice, or to attempt to commit that or any other crime.

To solicit or incite another to commit a crime would amount to an attempt.

Where a crime is attempted or committed by any person in pursuance of a conspiracy between two or more persons, they are all indictable as principals for the attempt to commit the crime or for committing the crime itself, as the case may be.

But a bare conspiracy to commit a crime is not a substantive and indictable offence except where such conspiracy is declared by special law to be a crime, as for instance, a conspiracy against the safety of the State.

At the trial of the prisoners for "conspiracy to defeat the course of justice" exception was taken that the "charge as laid is not an indictable offence."

Held, upon a question reserved for the opinion of the Court, that the exception was a good one.

Queen v. February and Mei (27th February, 1841) approved.

Argument on a point reserved at the trial of the prisoners at the Circuit Court held at Oudtshoorn on the 21st and 22nd September last. The prisoners, Moses Kaplan and Asser Kaplan were, together with Benjamin Kaplan and Hendrik Blumenthal, indicted for *conspiring to defeat the course of justice.*

In that whereas the said Asser Kaplan was arrested at Oudtshoorn on the 6th day of June, 1898, and committed for trial on the same day by the Resident Magistrate for the district of Oudtshoorn, on a criminal charge, which was then and there preferred against him of having on the 24th day of May in the said year received certain ostrich feathers from one Lombaard, he the said Asser Kaplan well knowing the said ostrich feathers to have been stolen; and whereas the said Asser Kaplan was released on bail on the said 6th day of June on condition that he should appear to answer to any indictment that might be preferred against him within six months thereafter; the said Moses Kaplan, the said Asser Kaplan, the said Benjamin Kaplan, and the said Hendrik Blumenthal did on divers days between the 19th day of June and the 9th August in the said year, and at Oudtshoorn, Kamnatie, Stolsvlakte and divers other places, all in the said district of Oudtshoorn, all or two or more of them wrongfully, unlawfully, and corruptly conspire together with intent to prevent and obstruct the due course of justice and did by bribes and other corrupt means attempt,

(a) To dissuade the aforesaid Lombaard, who was a material witness for the Crown in the prosecution of the criminal charge preferred as aforesaid against the said Asser Kaplan, from giving his testimony in regard to the prosecution of the said criminal charge before a Court competent to adjudicate upon it; and further,

(b) To remove the said Lombaard, or to induce him to remove to some place beyond the jurisdiction of this Court, or to some other place and to remain concealed there in order that the said Lombaard should not be duly compelled to appear and give evidence at the trial of the charge preferred as aforesaid against the said Asser Kaplan when brought before a competent Court, but should be prevented from being so compelled to give evidence or from voluntarily attending to give evidence at the said trial; and further,

(c) To induce the aforesaid Lombaard, who was committed for trial but admitted to bail on a

charge of stealing the aforesaid feathers, to remove to some place outside the jurisdiction of this Court and not to surrender to his bail but to avoid his trial.

Secondly. As also in that whereas the said Asser Kaplan was arrested at Oudtshoorn aforesaid on the said 6th of June, and committed for trial on the same day by the Resident Magistrate for the district of Oudtshoorn on a criminal charge which was then and there preferred against him as aforesaid; and whereas the said Asser Kaplan was released on bail on the said 6th day of June on condition that he should appear to answer to any indictment that might be preferred against him within six months hereafter; the said Moses Kaplan, the said Asser Kaplan, the said Benjamin Kaplan, and the said Hendrik Blumenthal did on divers days between the 19th day of June and the 9th day of August in the said year, and at Oudtshoorn, Kamnatie, Stolsvlakte and divers other places, all in the said district of Oudtshoorn all or two or more of them wrongfully, unlawfully, and corruptly conspire together with intent to prevent and obstruct the due course of justice and did by bribes and other corrupt means attempt:

(a) To dissuade one Willem Buis *alias* Willem Willemse, a labourer residing at Kamnatie aforesaid, who was a material witness for the Crown in the prosecution of the criminal charge preferred as aforesaid against the said Asser Kaplan, from giving his testimony in regard to the prosecution of the said criminal charge before a Court competent to adjudicate upon it; and further,

(b) To remove the said Willem Buis *alias* Willem Willemse, or to induce him to remove to some place beyond the jurisdiction of this Court, or to some other place and remain concealed there, in order that the said Willem Buis *alias* Willem Willemse should not be duly compelled to appear to give evidence at the trial of the charge preferred as aforesaid against the said Asser Kaplan when brought before a competent Court, but should be prevented from being so compelled to give evidence or from voluntarily attending to give evidence at the said trial.

From the evidence given, it appeared that Asser and Moses Kaplan were anxious to remove Lombaard and Buis from the jurisdiction, and consequently gave them a cart and horses and other necessaries. Lombaard was to shave off his eyebrows and rub something in his eyes to make them appear watery, and to wear spectacles, so that he might pass for a German. Benjamin Kaplan, who was no relation of the other two Kaplans, seems to have sold the spectacles to Lombaard, and it was in consequence of his refusing to supply Lombaard with a few other articles that the latter altered his mind at the last moment and refused to go away, though he did not return the cart and horses, but sold them to Gert Olivier.

No steps were taken by prisoners to recover the cart and horses from Lombaard when he declined to go.

The evidence against Asser and Moses Kaplan was strong, and they both had a motive for securing the removal of important witnesses. The defence they set up was that they gave one Klaas Rutgers £50 for Mrs. Lombaard. This money was alleged to be an inducement to Lombaard to say that what he had stated in an affidavit against them was false and to speak the truth. They denied that they had given anything else, and also that they had any intention of removing the witnesses from the jurisdiction.

Lombaard and Buis both admitted in cross-examination that they had no intention of removing from the jurisdiction.

The jury found Blumenthal and Benjamin Kaplan not guilty, and Asser and Moses Kaplan guilty—Moses was sentenced to pay a fine of £200 or twelve months' imprisonment with hard labour, and Asser to pay a fine of £50 or six months' imprisonment, to commence at the expiration of his previous sentence. (He having been convicted on a charge of receiving feathers knowing them to have been stolen.) At the request of counsel, the Chief Justice reserved for the consideration of the Supreme Court the question whether the offence charged against the prisoners was an indictable offence or not. In consequence of this his lordship allowed bail for £200 in the case of Moses Kaplan, and ordered that the sentence against him should be suspended in the meantime. Asser would have to undergo the punishment he received in the case of receiving stolen property in the meantime.

Mr. Tredgold now appeared for the accused and contended that a bare conspiracy to commit a crime was not known to the Roman-Dutch Law as a substantive crime. *Van der Linden* (II. 1, 7, p. 182) speaks of a conspiracy to commit a crime, but only as a previous agreement to commit a crime which is subsequently carried out. *Van Leeuwen* (Roman-Dutch Law, IV. 83, 8, Vol. II. 251) lays down that he who orders, counsels, or incites another to commit a crime is equally guilty. Both of these authors regard it as essential that a crime should have been committed. The only idea seems to be that of accessories before the fact. In this case no crime was actually committed. *Carpzovius de Pract. Crim.* (2, 87, 4) lays down that the bare counselling of a crime is no crime in itself. A bare intention is clearly no crime in our law as well as in the English law. *Matthaus de Criminibus* (Proleg., Cap. 1, Sec. 5) and *Carpzovius* (1, 22, 70.) The writers on Roman-Dutch law do not seem to deal with conspiracy as a substantive crime but only incidentally in treating of accessories to other crimes. The question was discussed in *Regina v. Braham*

(1 App., 147), but was not decided. The case of *Regina v. February and Mei*, heard in February, 1841, is strongly in favour of the present contention (see Supreme Court Records, Circuit Court for Worcester, 1841, and the notes of Wylde, C.J., Supreme Court Library). There it appears to have been decided that conspiracy was unknown to our law as a substantive crime.

Mr. Giddy for the Crown: The crime of conspiracy was known in the Roman-Dutch law, although not perhaps in the extended sense in which it is now used in English law. If a prisoner can be convicted of an attempt to commit a crime he can also be convicted of conspiring to commit a crime. *Regina v. February and Mei* was overruled by *Regina v. Braham*.

Mr. Tredgold in reply: The accused could hardly be convicted of an attempt here. The general principle is that where a crime is laid in an indictment it is competent for the jury to convict of a lesser crime of a similar character. Here an attempt would be a greater crime than a mere conspiring. Besides, if an attempt had been alleged an entirely different defence would have been adopted. The Court will not stretch the meaning of words in a criminal case. The Crown must clearly show that the crime charged is one actually known to our law. The English law on the subject is based on Statute. *Stephen's Hist. Cr. Law* (Vol. II., p. 227). The Star Chamber stretched the meaning considerably beyond the original intent of the Statute. The existence of the crime in the system of English law proves nothing with regard to its existence in Roman law.

Cur ad vult.

Postea (November 9).

The Court delivered judgment.

The Chief Justice said: The question reserved for the opinion of the Court is whether by our law a bare conspiracy between two or more persons to defeat the course of justice constitutes a substantive and indictable offence. Before deciding this question it would be well to inquire, firstly, whether defeating the course of justice is a criminal offence; secondly, whether an attempt to commit such an offence is indictable; and thirdly, whether an agreement between two or more persons to commit a crime renders the conspirators liable to be indicted for the attempt, if the commission was only attempted, or for the crime itself, if it was actually committed. That it is an indictable offence to defeat and obstruct the due course of justice was decided by the late Court of Appeal in *Queen v. Foye and Carlin* (2 App. C., C. 121). That decision was founded partly upon the admission of counsel for the persons there accused and partly upon the previous practice of this Court. Considering the uncertainty and want of precision which characterise

the criminal law of Holland, this Court has always deemed it its duty to adhere firmly to any rule of criminal law practice once established, and I see no reason for acting differently in the present case. The offence of defeating the course of justice may be committed in many different ways. Where it amounts to contempt of Court, the Court which is thus brought into contempt may, if it be a Court of record, summarily punish the offender without the intervention of a jury, as was decided by the Privy Council in *Mc Dermott's case* (2 L.R., P.C., 841), which was an appeal from British Guiana, where the Roman-Dutch law prevails. But the offence is nevertheless a "criminal offence," as was expressly laid down by the Privy Council in *In re Pollard* (2 L.R., P.C., 106). To such an extent is this principle carried that in the recent case from the Bahama Islands (L. R., App. Cases, 1892, p. 188) the Privy Council held that the Royal prerogative extends to the remission of sentences, which are merely of a punitive character, inflicted for contempt of Court. My own personal view has always been that, except where immediate punishment is necessary for the maintenance of the authority of the Court, it is a wiser course for the Court not to take into its own hands the summary punishment of offenders whose contempt is of such a nature as to render them liable to an indictment. The defeating of the due course of justice appears to me to be a contempt of that nature. There may be cases in which such contempt must be summarily dealt with, but except in such cases the practice to submit the question whether the offence has been committed to the decision of a jury appears to me to be a wholesome one. In either case, however, the prerogative of the Crown would extend to the remission of any sentence imposed. As to the second question, it is unnecessary to cite many authorities in support of the proposition that an attempt to commit a common law crime is an indictable offence. *Mathæus (De Crim. Proleg.*, chapter 1, sections 5 and 6) discusses the difference between meditating and attempting a crime, and comes to the conclusion, notwithstanding weighty authority which might appear to militate against his view, that without some overt act the meditation of a crime is not indictable, whereas an attempt to commit a crime—although the act may be inchoate merely—is an indictable offence. Among attempts to commit crimes he includes any conspiracy to kill the *princeps* or any of his senators, but this is the only kind of conspiracy mentioned by him. *Bynkershoek (Obs. Jur. Rom.*, b. 8, c. 10) is more guarded, and decides, after an elaborate review of the Roman law authorities, that the mere intention (*voluntas*) to commit a crime is not punishable, unless it be

pecially declared to be so by any particular law, and he mentions as an instance of the intention being punishable the case of conspiracy (*conjunctio*) against the safety of the State. In another passage he admits that where the intention is evinced by an overt act amounting to an attempt, such an attempt is an indictable offence. Boehmer treats the subject with great fulness in his *Meditationes* (article 178), and defines an "attempt" as consisting in the "preparation and application of means directed towards the consummation of a crime." He points out (section 3) that the attempt must be proved from external acts and not from the mental operation alone, and that where such external acts have been proved the attempt is criminally punishable, although the intended crime may not have been completed. The practice of our own Courts has certainly been to treat an attempt to commit a common law crime as a substantive offence, and the only difficulty which has arisen in such cases has been in determining whether the acts of the accused amount to an attempt. In the case of *Queen v. Töpkén and Skelly* (1 App. C., C. 471), the prisoners had made a plan to commit a highway robbery, and had even bought revolvers for the purpose, but there was nothing to show that the one had incited the other, and before they were arrested they had sold the revolvers and relinquished their plan. It was held that they had been improperly convicted of an attempt to commit a robbery; but it was clearly assumed that the offence was an indictable one. As to the criminal liability of all the parties to a conspiracy to commit a crime which is in consequence either attempted or actually carried out they all appear to me to be partners in guilt (*socii criminis*), and therefore punishable as principal offenders. The question is fully discussed by Boehmer (*Meditationes*, article 148, section 1, and article 177, section 3) in connection with the crime of homicide committed by one or more persons with the assistance of others. He holds that the conspirators are equally liable with those who actually committed the deed, but he assumes throughout the discussion that some criminal act was done in pursuance of the conspiracy. Van der Linden (*Inst.* 2, 1, 7) refers to such a conspiracy as a "complot" or "zamenzweering." "If," says he, "the parties to such a complot have met together and been prepared for mutual aid and co-operation for the performance of the deed, they are all equally punishable, although the deed itself, for instance a murder, has been performed by some of them only." Such conspirators are really accessories before the fact, as they would be called in England, and are by law punishable as principals. But the question still remains

whether such a conspiracy, as such, and without any overt act done in pursuance thereof, is indictable under our law as a substantive offence. In the case of high treason and other offences against the safety of the State a conspiracy to commit the crime is certainly a substantive crime, and punishable accordingly. The particular crime with which the Court has now to deal is that of defeating the course of justice, and the question reserved is whether a conspiracy to commit that crime is an indictable offence. I have not been able to find any authority on Roman or Dutch or South African law which treats such a conspiracy as a substantive crime, or which treats every conspiracy to commit any crime, whatever its nature may be, as being itself an indictable offence. The notion that every agreement to break the law, whether any act be done in pursuance thereof or not, is punishable as a criminal offence has been derived from the English law. According to Mr. Justice Stephen (2 *History of the Criminal Law of England*, p. 228), the earliest meaning of conspiracy was a combination to carry on legal proceedings in a vexatious or improper way. It was rather a particular kind of civil injury than a substantive crime, but like many other civil injuries it was also punishable on indictment at the suit of the King. The learned author adds: "The Star Chamber first treated conspiracies to commit crimes or indeed to do anything unlawful as substantive offences, and after the Restoration this among other doctrines of theirs found its way into the Court of King's Bench. The doctrine was expressed so widely or loosely that it became in course of time a head of law of great importance and capable of almost indefinite extension." The English law of treason, as first defined by Bracton, is to a great extent founded upon the Roman law, and it appears to me by no means improbable that the Star Chamber finding that a conspiracy to commit treason was a punishable offence under the Roman law, was induced to extend the principle to all conspiracies alike. This extension, however, has never been admitted by our own law. The whole question seems to have been very fully discussed in this Court in the case of *Queen v. February and Mei*, decided as far back as February 27, 1841, but unfortunately neither the arguments in full nor the reasons for the judgment have been reported. The prisoners had been indicted in the Worcester Circuit Court for "conspiring to cause the commission of the crime of arson," and at the trial a special verdict was found by the jury. The special verdict left it, among other things, to the Supreme Court to decide whether the crime as charged was an indictable offence. During the argument in this Court this question was fully discussed, and many authorities quoted for and against the prisoners. The Court decided

that "by the law such a crime as charged in the indictment could not consist, and is unknown thereto," and ordered "that the prisoners be discharged as to the offence laid in this indictment." But it is contended for the Crown that that decision has been virtually overruled by the Appeal Court in the case of *Queen v. Braham* (1 Appeal Court, C. 147). The point there decided was that even if "conspiring to prevent and obstruct the due course of justice" be an indictable offence, the facts proved did not disclose an agreement or concurrence of two or more persons, and that accordingly there could be no conspiracy. The question whether the indictment disclosed an indictable offence was not decided, but that question is the very one which has been reserved for the opinion of the Court in the present case. The result of my investigation into the authorities is that the question must be answered in the negative. The exception taken in the Court below, that the charge as laid in the indictment is not an indictable offence, must be sustained, and the conviction and sentence set aside.

Mr. Justice Buchanan: I concur in the judgment. Since the adjournment of the Court I have spent considerable time in looking over the old authorities, and I found the law to be as laid down in the judgment which has just been delivered by the Chief Justice. I found one case with reference to attempt. It was an old decision of 1864 to which my attention was directed, and the Bench then unanimously expressed the opinion that an attempt, evidenced by some sufficient external act, is indictable. That is the only authority which has not been cited by the Chief Justice, and I mention it in support of the first portion of the judgment. The other authorities which I consulted are fully discussed in the judgment.

Mr. Justice Upington: I am also fully of the same opinion

[Prisoners' Attorney,—Swemmer, Oudtshoorn.]

SUPREME COURT.

Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

SOUTH AFRICAN MUTUAL V. VISAGIE. { 1898.
Nov. 2nd.

Mr. Jones moved for provisional sentence for £650, with interest at 6 per cent. from the 20th June, 1892; and that the property be declared executable.

The application was granted.

BARTHOLOMEW V. EDGCOMBE

Mr. Currey moved for provisional sentence for £72 15s. 6d., less £1 paid, in terms of the promissory note, and £110s. 8d. otherwise credited, with interest at 6 per cent. from the 15th July, 1898.

Granted.

GENERAL MOTIONS.

OLIVER V. OLIVER.

Mr. Webber moved for leave to sue in *forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce.

Referred to counsel.

FESTER V. FESTER.

Mr. Sheil moved to make absolute the rule nisi admitting applicant to sue in *forma pauperis* in an action against his wife for divorce by reason of her alleged adultery.

The application was granted.

DICK V. DICK. { 1898.
Nov. 2nd.

This was an action for divorce by the husband by reason of his wife's alleged adultery with one Obermeyer, of Kull's River. The plaintiff claimed the custody of the children, and costs.

Mr. Shippard appeared for the plaintiff; the defendant in person.

Mr. Norman Laoy produced the original certificate of the marriage, which took place on the 25th of May, 1874.

John Frederick Dick, a coloured man, deposed that he was a farm labourer. There were eight

children of the marriage living. His wife left him on August 28, ostensibly on a visit, and in consequence of what he was told he went to Kuil's River and found her living with Obermeyer.

Defendant said she left her husband on account of his shameful ill-treatment. He had beaten her, and threatened her with a knife. He was the cause of her leaving him.

Plaintiff admitted that he had pulled his wife about on one occasion in a fit of passion and jealousy. He was quite prepared to take her back but she would not go.

Andreas Diok, one of the plaintiff's children, was examined with reference to the adultery.

Defendant admitted that she was living with Obermeyer. She repeated that she was driven to it by the conduct of her husband. She asked the custody of the younger children.

The Court granted a decree for divorce, the plaintiff to have the custody of the four eldest children, and the defendant the custody of the four youngest, the plaintiff to have access at all reasonable times to them, and leave to be reserved to the plaintiff to apply hereafter to the Court on the matter of the custody of the children.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinne.]

GLAESER'S EXECUTOR V. QUIN. { 1898. Nov. 2nd.

This was an action for the recovery of £25, balance due for liquor sold, which had already been part heard, the plaintiff's case having closed, and postponement made to enable the defendant, who was ill, to give evidence.

Mr. Graham for plaintiff, and Mr. Joubert for defendant.

Mrs. Maria Stewart, daughter of the defendant, Mrs. Quin, deposed that up to January, 1891, she lived with her mother at Worcester. She was there in 1885, 1886, and 1887. Her sister Kitty died about two years and a half ago. She knew the late Johannes le Sueur Glaeser, who had a liquor store there. Witness had charge of her mother's affairs, paid the accounts, and looked after the cash. Her mother was rather weak-minded. She told the late Mr. Glaeser once not to give any liquor on credit, and he said she need not trouble about it, and he wouldn't ask her for the money. She heard her mother tell him that also, and he just laughed it off. She didn't know anything about this liquor for which the claim was made being bought from Glaeser. Her mother never, to her knowledge, authorised her sister to order this liquor. Witness did not know Martha Christian, and never heard that her mother went to anybody's house to order liquor and drink it. Her sister

was a music teacher, and had an income of her own. Her mother was unable to give any reliable evidence, and had been ill for the past six months.

In cross-examination by Mr. Graham, the witness said the documents produced signed by her mother must have been signed outside, as she did not see her mother sign them in the house. The orders for the supply of liquor produced were in her sister's handwriting.

Mr. Joubert was heard for the defendant.

The Court gave judgment for the plaintiff.

The Chief Justice said: Whatever doubts might exist as to the debt after the oral evidence given, they were entirely removed by the document, which was admittedly signed by Mrs. Quin. There is no allegation that at the time she signed the document she was not in a fit state to do so. Here is a clear acknowledgment of the debt and of the amount of the account. The only other question is the legal question with reference to the liquor having been bought at a licensed house. The 68th section prohibits the keepers of licensed houses from suing any person to whom they have supplied liquor on credit for consumption on the premises. I understand that to mean liquor consumed by the person to whom the liquor was sold. In the present case the liquor was not consumed on the premises at all. It was sent to Mrs. Quin's house, or to the house of the person with whom she was staying. An infinitesimally small quantity of the liquor was consumed on the premises by the messenger who was despatched for it by Mrs. Quin. That quantity is so small that it need not be taken into account. Judgment will therefore be given for the plaintiff. With reference to the delay it is clear that the executors did not believe that this woman had any money, but when it was discovered that she had property they sued her.

Their lordships concurred.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorneys, Messrs. Reitz & Herold.]

REGINA V. POCKOCK. { 1898. Nov. 2nd.

Cruelty to animals — Act 18 of 1888—
Section 2—Alleged contravention—Conviction quashed on appeal

Appeal from a sentence passed upon the appellant by the Resident Magistrate for Tulbagh. The accused was charged with a contravention of section 2 of Act 18 of 1888, in that, on the 11th September, 1898, he wrongfully and unlawfully, wantonly and cruelly ill-treated, abused, wounded, or tortured, or caused to be wantonly and cruelly ill-treated, abused, wounded, or tortured, a certain horse, his property, or in his lawful possession, which was then being driven and used in the post-

cart employed in the conveyance of Her Majesty's mails between Clanwilliam and Piquetberg-road Station. The accused pleaded not guilty. He was found guilty, and sentenced to pay a fine of £1 or one week's imprisonment. From this sentence the accused now appealed.

The following evidence was given for the prosecution:

Ephram Lucas, sworn, states:

I am a mounted constable stationed at Piquetberg Road, in this district. The defendant Peacock is the contractor for the conveyance of the mails between Piquetberg Road and Clanwilliam. He employs a cart for this purpose. I was at the Piquetberg Station on the 11th ulto. when defendant's post cart arrived there about midday from Clanwilliam. There were two horses pulling in the cart at the time, which was being driven by a lad of about 14 years of age.

This lad was not the usual driver, who I understood had met with an accident. One of the horses which were employed in the post cart when it arrived at Piquetberg Road on that occasion was suffering from a very bad breast, which was so severely chafed and galled that there was actually a discharge from the wound. This wound on the horse's breast was caused by the chafing of the harness.

I remonstrated with the lad for driving a horse in such a condition. He replied that he could not help it, as there were no other horses for him to drive.

I had on a previous occasion about a week before this remonstrated with the regular post driver Jan Prince for driving this particular horse. Jan Prince excused himself on the ground that his master the defendant takes no heed of his representations regarding the condition of the post horses. I warned defendant's agent, Mr. Stevens, at Piquetberg Road that if he attempted to drive this particular horse again when its breast was in that condition I should at once outspan it. Defendant's agent Stevens admitted that this horse was unfit to be employed, and another horse was then engaged to take the post back to Clanwilliam.

Cross-examined: I am positive this occurred on 11th September. The injury was in my opinion caused by the harness, not by the cross-bar. The chafe was on the right side of the horse's breast and was about the breadth of my hand. I should say that the wound would not be healed for fully three months.

By the Court: Defendant's horses generally have been in a very poor condition of late and it was the subject of general remark.

John Wm. Crosbie, sworn, states:

Last month I was engaged by the defendant to drive the post cart between Clanwilliam and

Piquetberg Road. I drove the post for six trips to and fro. The horse employed on the last stage between the Dry and Piquetberg Station were then in good condition. . . . I swear I did not hear Jan Prince tell defendant that the horse's breast on the line was sore, nor did I tell anyone that I had heard Prince tell defendant that the horse's breast was sore. I did tell Constable Lucas, when he informed me that he had detained this particular horse at Piquetberg Road, that I had heard Prince say something to defendant about the horses on the line, but I had not listened attentively to what he had said. I did hear Prince tell the defendant that one particular horse on the line required to be replaced, but I did not then know that he was referring to the horse in question.

Cross-examined: The horses generally on the line are in fair condition, and there were none when I travelled with them suffering from sore breast.

By the Court: The road throughout was in a very bad state.

The following evidence was given for the defence:

Jan Prince, sworn, states:

I am in the service of the defendant at Clanwilliam. I was his post driver until recently I drove the post between Clanwilliam and Piquetberg Road on 8th September last. On that particular occasion I drove the horse now in question, named Proctor, on the up trip to Piquetberg Road, this was on Friday, 8th ulto. This horse had then a slight gall about the size of a shilling piece on his left breast; beyond this the horse was all right. This horse was galled by the cross-bar not by the harness. I did, I think, in the month of August last apply to my master the defendant for another horse to replace one on the line which was unshod. I never reported to my master that the horse "Proctor" was chafed, because the injury was so slight that I did not think it was necessary. Consequently defendant knew nothing about this horse's sore breast.

By the Court: I can't say whether it was because I got drunk when driving the cart and met with a severe accident on the post cart on September 10 that defendant took me off the line as post driver and made me a stable boy instead. Constable Lucas had on one occasion during the month of August asked me whether I was driving this horse "Proctor." I said I was doing so. Constable Lucas then remarked that the horse's breast was sore, but this I denied, and I continued driving the horse "Proctor" up to the 8th September. This horse is now again pulling in the post cart on the line. I drove him yesterday and his breast is quite healed. I swear Constable Lucas never told me that I was to report to de-

fendant that the horse on the line was unfit to work, nor did I report to my master that this horse "Proctor" was unfit for work.

The accused gave the following evidence: I am post contractor, residing at Clanwilliam. On the 9th September last witness Prince arrived with the post cart at Clanwilliam. Prince did not tell me there or at any other time that the horse "Proctor" had anything the matter with him, nor did my agent, Mr. Stevens, at Piquetberg Road acquaint me of the fact that the horse "Proctor" was unfit for work before the 11th September. The note of 15th September, marked "A," put in I received from my agent Stevens reporting that the horse's breast was sore, and that I had been charged with cruelty to animals.

On the 10th September Prince on the return journey to Piquetberg Road met with the accident, in consequence of which the post cart was delayed at Porterville. By direction of the Postmaster-General another driver was engaged to drive the post cart from Porterville arriving at Piquetberg on 11th September.

The first information I had that the horse's breast was sore was from my agent Stevens, and I immediately took steps to replace the horse.

By the Court: The wound is however now completely healed, and the horse "Proctor" is again drawing in the post cart.

I might have produced the horse here to-day but I did not think it was necessary for me to do so, as I considered there was no charge against me.

The Magistrate stated in his reasons that in arriving at a verdict of "guilty" he relied absolutely upon the testimony of Constable Lucas, who had previously reported that the horses employed in the defendant's post cart were in a wretched condition and unfit for work.

Mr. Graham was heard in support of the appeal, and contended that the onus was on the Crown to prove knowledge on the part of the accused as to the horse's condition, and in this it had wholly failed.

The constable never saw the accused. He says that the boy said something about the horse's condition. The boy who was called for the prosecution denies this, and in any case could not be evidence against the accused.

The proper remedy was to have prosecuted the driver.

Mr. Giddy for the Crown.

The appeal was allowed.

The Chief Justice, in giving judgment, said: The constable in this case acted very properly in instituting a prosecution for cruelty to this horse. I quite agree with the Magistrate that the evidence of the constable must be implicitly believed, and the whole tenor of his evidence shows that the prosecution was instituted to prevent gross cruelty

to the horse employed in the post cart. The Magistrate founded his judgment solely upon the evidence of this constable. Now, unfortunately, that evidence by itself is not sufficient to convict Pocock. The constable could only say what was told him by Jan Price, and this could not be evidence against Mr. Pocock. When Jan Price and the boy were called as witnesses they denied that the defendant knew anything whatever about the condition in which this horse was. I must say that very slight evidence only would, in my opinion, be sufficient to convict the post contractor, whose duty, I think, is to see to his horses and to take care they are in a fit condition. But it does not appear that this particular horse had been in an unfit condition for any length of time before the prosecution took place. It appears to me that there is a total absence of any knowledge, or possible knowledge, on the part of the post contractor of the condition in which the horse was. The Act makes it penal to wantonly or cruelly beat, abuse, wound, ill-treat, or cause to be beaten, abused, wounded, or ill-treated any domesticated animal; but clearly there must be some proof of knowledge on the part of the owner. As I said before, the slightest proof of knowledge would be sufficient, but in this case even that slight knowledge has not been brought home to the prisoner. I think it would have been better for the Magistrate, under the circumstances, not to have found the prisoner guilty, and the appeal therefore will be allowed.

Their lordships concurred.

[Applicant's Attorney, G. Montgomery-Walker.]

LANGE V. CLAASE. { 1898.
Nov. 2nd.

Plaintiff—Non-resident—Insolvent—Security for costs.

The mere fact that a plaintiff is an unrehabilitated insolvent does not entitle the defendant to demand security for costs.

The case of Van der Walt v. Hudson and Moore (4 Juta, 365) distinguished.

Appeal from a judgment of the Eastern Districts Court in an application by the present appellants calling upon the respondent to show cause why he should not find security for costs (in an action instituted by him against the appellants (defendants) for payment of a sum of £2,568 17s. 1d., alleged to be due to him for salary and wages, goods sold and delivered, and in other respects), on the grounds of his being an unrehabilitated insolvent.

The application was refused, with costs, the following being his lordship the Judge-President's reasons:

This is an application on the part of the defendant for an order on the plaintiff, an insolvent, calling upon him to give security for costs in an action in which he sues (*inter alia*) for wages. The plaintiff, although an insolvent, is entitled to sue for wages, but it is contended he must give security for costs. The principle appears to me to be clearly and also very broadly laid down in *Witham v. Venables* (1 Menz., 291). There the Supreme Court, after full argument and a deliberate consideration of all the authorities, held that an *incola* of this colony cannot, as plaintiff, be compelled to give security for costs "whether he be rich or poor, solvent or insolvent." It is contended for the applicant that, although this was the admitted language of the Court in that case, the proposition was there too broadly laid down, and that only so much as was necessary to determine the point at issue in that case can be regarded as a judgment of the Supreme Court, that what was said about "rich or poor, solvent or insolvent," must be regarded as *obiter dicta*; that the Supreme Court had recently, in the case of *Van der Walt v. Hudson & Moore* (4 Juta, 366), held that where an insolvent father sued on behalf of his minor son without the previous sanction of the Court, he was, upon the application of the defendant, ordered to give security for costs. The decision in that case, however, seems to be based upon the peculiar facts of that case. There the insolvent sued on behalf of his ward without the previous sanction of the Court, and in such cases the Court was of opinion that the tutor should be required to give security for costs, because he might have applied for leave of the Court to sue on behalf of the minor and did not do so. The reason for that decision, grafted as an exception to the general rule already referred to in *Witham v. Venables*, does not apply to the present case. In the present case the plaintiff could not have applied to the Court for leave to sue for wages, and in the present case, moreover, the plaintiff is not, like the minor, under the special protection of the Court as upper guardian. The result of allowing the present application would be to encourage applications *in forma pauperis*. It may, perhaps, be argued that a law which compelled a plaintiff to find security for costs, unless he declare on oath, or produce a certificate of counsel that he has a good cause of action, would be a wise law, but that is not our law, and until there be some such law, the principle laid down in *Witham v. Venables* is best applicable to cases like the present, where minors are not concerned, and leave to sue cannot be applied for, seeing that an insolvent, although uncertificated, may have leave to trade, and so acquire more than £10 worth of property, and may also legally acquire property by

his own labour. The application must be refused with costs.

From this judgment the applicants now appealed.

Mr. Rose-Innes, Q.C., was heard in support of the appeal. He contended that the question of giving security was a matter of practice and in the discretion of the Court.

Witham v. Venables relied upon in the Court below was opposed to the old Dutch law under which all plaintiffs, even those who had immovable property within the jurisdiction, were obliged to give security, as this the Court practically decided in *Lumsden v. Kaffrarian Bank* (8 Juta, 366). See also *Van der Walt v. Hudson & Moore* (4 Juta 327-365.)

The Chief Justice referred to the 49th section of the Insolvent Ordinance.

Mr. Rose-Innes: Here the claim is for over £2,000, and cannot all be for wages.

Mr. Molteno for the respondent was not called upon.

The Court dismissed the appeal.

The Chief Justice said: The plaintiff is a permanent resident in this colony, and the only ground relied upon by the defendant in his application for security against costs was that the plaintiff is an unrehabilitated insolvent. Under the later Dutch law only such plaintiffs as were non-resident and were not possessed of sufficient immovable property could be required to give security for costs. The case of *Witham v. Venables* (1 Menz., 291), which recognised this rule, was approved of in the later case of *Schunke v. Taylor* (8 Juta, 106). But it is now contended that an exception has been engrafted upon the general rule by the case of *Van der Walt v. Hudson* (4 Juta, 365) and that an insolvent plaintiff, even if resident, can be compelled to give security. In that case, however, the plaintiff sued in his capacity as tutor of a minor without first obtaining the sanction of the Court. The minor was thus exposed to the risk of having costs awarded against him, and it was with the view of protecting the minor that the Court acceded to the defendants' application for security. It is true that the defendants thus obtained the benefit of an exception to the general rule, but the exception was only introduced in order to minimise the risks to which minors might be exposed by reckless litigation on their behalf by tutors. The reason for the exception does not exist in the present case, and the learned judge in the Court below was quite right in applying the general rule. The appeal must therefore be dismissed with costs.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Fairbridge & Arderne; Respondent's Attorneys, Messrs. Scanlen & Syfret.]

Ex parte JOHNSON { 1898.
Nov. 2nd.

Child — Marriage — Husband — Interdict.
The Court granted an interdict restraining a husband from interfering with his wife, a child fourteen years old, who alleged on affidavit that she had been compelled by her mother to go through a form of marriage with him in ignorance of what she was doing, pending an action to be brought by her to have the marriage declared null and void.

This was the petition of Lillian Maud May Johnson, daughter of Niel Johnson, by whom she was duly assisted.

The facts appear from the petition, which was in the following terms :

Showeth : That your petitioner is a minor, of the age of fourteen, having been born on the 7th March, 1879. That on or about the 9th of September last your petitioner's mother, Elizabeth Johnson, told your petitioner in the morning to dress herself and accompany her to town. That your petitioner's said mother took her to the Magistrate's Court, where she met David J. McIntyre, who was formerly assistant to your petitioner's father in the Green Point flash lighthouse. That the said McIntyre, your petitioner, and her mother went in a room there where a gentleman was sitting at a table, and your petitioner's mother told your petitioner that she had to sign the names Lily May to a piece of paper, on which she and McIntyre had already signed their names. That your petitioner had no knowledge of what she was signing. That your petitioner's mother and the said McIntyre spoke together, but your petitioner could not hear what they said. That afterwards your petitioner's said mother took her to the Scotch Church in Somerset Road, where we were shown into a room, and sat there for sometime. That subsequently McIntyre came in and had some conversation with the minister. That afterwards the minister read something out of a book: and asked McIntyre and then your petitioner to repeat something after him; that at first your petitioner refused to repeat the words, but afterwards her mother pushed her and told her to do it, and your petitioner repeated the words, being afraid of her said mother. That your petitioner had no knowledge of the meaning of the words she was told to repeat after the minister; that then your petitioner was told to sign the names Lily May on three papers; your petitioner's mother telling her to sign as she had signed before. That your petitioner had no knowledge of what she was signing. That from there your petitioner was taken to the house of a Scotch lady, Mrs.

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Adams, where they had a bottle of lemonade, and that then your petitioner was taken by her mother in an omnibus to her home. That your petitioner had not the least knowledge that she was married to the said McIntyre until she was told so by her sister, Annie Elizabeth Bennett, about the latter end of October. That your petitioner has never seen the said McIntyre since leaving the Scotch manse. That the said David J. McIntyre is now lighthouse-keeper at Dassen Island, and your petitioner's mother has told her to get her clothes ready to go with her to-night to Dassen Island. That your petitioner is desirous of having the said marriage declared null and void. Wherefore your petitioner prays that it may please your honourable Court to declare the said marriage null and void *ab initio*, and that she may have such further and other relief as to your Honourable Court may seem meet, with costs against the said David J. McIntyre.

Mr. Graham was heard in support of the application for an order restraining the petitioner's husband from interfering with her pending the institution of an action to have the marriage declared null and void.

The Chief Justice: If the statements made on behalf of this girl are true this is certainly one of the most scandalous cases which have occurred within my recollection on the part of this girl's mother and this man McIntyre. This girl is a mere child, and the surprise is that a licence should have been granted and that she should ever have been allowed to be married to this man. This is certainly a case for the interference of the Court, and a rule *nisi* will be granted calling on McIntyre to show cause on the 12th December why he should not be restrained from interfering with or having access to the applicant, Lillian May, pending an action to be forthwith brought by her to have her alleged marriage with him declared null and void, the rule to be served upon him and upon her mother, and to operate as an interdict in the meantime.

Their lordships concurred.

[Petitioner's Attorney, J. Hamilton Walker.]

Theron v. Africa. { 1898.
Nov. 2nd.

Purchase and sale—Warranty—*Actio redhibitoria*—Return of part of a flock.

To an action for the price of things sold and delivered, facts, which would have been sufficient to found the redhibitory action, afford a valid defence.

A purchaser, who succeeds in the redhibitory action, is entitled to recover also the expenses

incurred by him for the due preservation of the things sold and delivered to him.

Where the purchaser of a flock of ewes, under a warranty that they had not been put to the ram within twelve months previously, has killed some of them and by that means only could discover, and did actually discover, that a considerable proportion of the flock are in lamb, he can only be compelled to pay the price of those which he has killed, and he may in reconvention claim the amount of expenses incurred in respect of the remainder, he tendering to return such remainder of the flock.

Appeal from a judgment of the Resident Magistrate of Worcester, in an action in which the present appellant, a farmer living in Sutherland, sued the respondent, a butcher carrying on business in Worcester, for the sum of £88, being the purchase price of 160 sheep at 11s. each sold by the appellant to the respondent, and delivered in the early part of September last.

The defendant pleaded that the sheep were not according to the agreement of sale, defendant having negotiated for *overloop* ewes, while those delivered were in lamb, some of them having lambs since their arrival in Worcester. That being burdened with this defect they were not *overloop* ewes, and were useless for the defendant, who carries on the trade of a butcher. Defendant further pleaded that he had tendered, and hereby again tenders, a cancellation of the sale by returning 129 of the same sheep to the plaintiff, and paying a sum of £17 1s., the price of 81 sheep slaughtered.

The defendant claimed in reconvention the sum of £10 as damages sustained by him by reason of the plaintiff having failed to deliver him the sheep according to agreement.

The plaintiff admitted the tender of 129 sheep and £17 1s., made on the morning of the trial, and as to the rest of the plea he joined issue with the defendant thereon.

The facts of the case appear sufficiently from the Magistrate's reasons, which were as follows:

The plaintiff alleges that he sold to defendant 160 sheep "*gus*" ewes, as they are called, i.e., ewes that have not lambed last season and are not in lamb. That the price was stipulated at 11s. per head, and that he supplied him with such ewes and despatched them by train to Worcester on the 1st inst.

The defendant again alleges that after the plaintiff entered into a verbal agreement with him for the supply of sheep, that is *overloop* or *gus* ewes, he (defendant) wrote to him on the

25th August last to send him 160 good fat sheep according to agreement, that thereupon plaintiff sent him 160 sheep but not *overloop* or *gus* ewes.

It appears to me that 160 sheep were sent by plaintiff as a matter of convenience, as that number filled four trucks, but as the defendant did not demur to that number, and no question has been raised on that point, I take it that there has been a tacit agreement as to it.

The only question is as to the condition of the sheep supplied, and as the defendant alleged that they were not in accordance with agreement it was for him to show this.

According to the defendant's evidence he received the sheep at the station personally on the 2nd September, and did not notice that any of them were big with lamb. He then had the sheep removed to his kraal outside this town, had his own distinguishing mark placed on them, and at once commenced slaughtering some. Six sheep were first slaughtered that same day, and the carcasses brought down to his butchery, and then six more. Both lots were in good condition, but on examining the carcasses of the last-named lot he found that some of the sheep had udders and that there was milk about them.

According to the evidence of Saban, who slaughtered the sheep, two of the twelve were found to be heavy with lamb. On the following day (Sunday) Saban reported to defendant that the sheep were not as they ought to be, but it does not appear that he actually reported that any sheep were found to be in lamb until the following Tuesday (5th September). On the morning of that day he found one of the seven ewes slaughtered to be in lamb, and sent the lamb to defendant for him to see, and that afternoon he saw and informed him that he had found ewes in lamb on Saturday, Sunday, and that day.

The defendant appears from his own evidence, corroborated by that of J. J. Theron, to have been willing up to Monday morning to compromise the matter with the plaintiff if he would reduce the price of the sheep, but after that he seems to have been unwilling, and he wrote to the plaintiff on Tuesday notifying that the sheep he had sent him were not in terms of their agreement and were mostly unserviceable for his purpose.

The plaintiff, who went out to inspect the sheep while in defendant's possession, endeavoured to prove that none of the sheep that came from him were in lamb, and that all the sheep he saw were not sheep that came from his farm, but as the sheep plaintiff saw were not identified by any one, his evidence and that of Botma, who accompanied him, appears very weak.

After hearing the evidence on both sides I think the defendant has proved that several of the sheep slaughtered by him did not satisfy the conditions of the contract.

Out of thirty-one slaughtered four were found to be in lamb, and taking that proportion it would be fair to assume that of 160 sheep supplied about twenty would be unfit for slaughter. One difficulty in the matter appears how to pick out the sheep that are so unfit.

The plaintiff's attorney appears to contend that inasmuch as the defendant did not repudiate the purchase at once, but slaughtered some of the sheep, he should have continued to do so, and that the result only would have shown whether more sheep were unfit for use, but this view does not seem to me reasonable. I think that as the defect of the sheep was not obvious at the time they were received, as soon as the defendant had satisfactory evidence that the sheep or a fair proportion of them did not satisfy the conditions of sale, he had the right to repudiate the sale, and this the defendant did within a reasonable time. True the defendant stated in his evidence in reply to plaintiff's attorney that he continued to slaughter plaintiff's sheep because he had none other, and that he would have continued to slaughter them after Tuesday if he had not bought Van der Westhuyzen's sheep, but there is no evidence whatever to show that in point of fact the defendant did slaughter any of the plaintiff's sheep after he learned from Saban the true state of things. Considering all the circumstances of the case, I thought that in addition to the cancellation of the sale as regards the remainder of the sheep, the defendant was entitled to some compensation for the trouble and loss he had been put to, and as he obtained substantially what he contended for when he made the tender at the commencement of the hearing, I considered that he was entitled to costs after that stage.

I should have stated before that in my judgment for the plaintiff were included two sheep (wethers) which had been supplied in terms of the defendant's order, and that these were not included in the cancellation.

Judgment was given for the plaintiff for £18 8s., the value of thirty-three sheep (thirty-one sheep slaughtered by defendant and two Afrikaner wethers specially supplied upon his order), and for the defendant for £7 10s. for damages sustained. The plaintiff to pay all costs after the tender made by defendant. The remainder of the sheep to be returned to the plaintiff.

From this judgment the plaintiff now appealed.

Mr. Beale was heard in support of the appeal. He contended that inasmuch as the defendant had accepted the sheep and continued to slaughter them day after day he could not now claim to return the remainder. His remedy was not by the *actio redhibitoria* but by the *quantum minoris*.

The principle was clearly laid down in *Irvine*

& *Co. v. Berg* (Buch. 1879, p. 138). In that case the mealies were found to be unsound, but the plaintiffs sold them at a profit, and then claimed damages because they were not sold at a still greater profit. So in the present case the defendant kept the sheep and slaughtered them after he knew they were not according to agreement. That being so he could not now repudiate the contract.

The following authorities were referred to and discussed:

Voet (21, 1, 8, 4, 5, 6); *Grotius* (8, 15, 7); *Mostert v. Noach* (8 Juta, 174); *Meintjes & Dixon v. Deare & Dietz* (2 Searle, 294); *Brown v. Van Niekerk* (2 Searle, 302); *Lipschütz v. Kunne* (3 Sheil, 98).

Mr. Rose-Innes, Q.C., for the respondent referred to *Murray v. De Villiers* (1 Menz. 866), but he was not allowed to conclude his argument.

The Court dismissed the appeal.

The Chief Justice said: The defendant is a butcher at Worcester, and, to the knowledge of the plaintiff, the sheep in question were required for the butcher's business. It is admitted on both sides that the plaintiff was not bound to deliver wethers only, but that it was a condition of the contract of sale that if ewes were delivered they should be such as had not been to the ram within twelve months previously.

It was proved in the Court below that it was impossible, by merely inspecting the sheep on their arrival at Worcester, to tell whether the condition had been complied with or not.

The only certain test was killing the sheep. The slaughterer found that out of the first lot killed by him two were in lamb, but he did not at once report the fact to the defendant. He afterwards found two more in lamb and then, three days after the delivery, informed the defendant that out of thirty-one ewes killed four were in lamb. Thereupon the defendant repudiated the sale and offered to return to the plaintiff the remainder of the flock.

Two questions arise in this case, viz., whether the defendant can set up the breach of warranty as a defence to an action for the purchase price of the flock, he tendering to pay the price of those which he had killed and to return the remainder; and secondly, whether he is entitled to claim as damages the expenses incurred by him in respect of the remainder of the flock so tendered by him.

It is not seriously disputed that if the full price had been paid on delivery and none of the sheep had afterwards been killed, the defendant would have been entitled to his redhibitory action for the return of the purchase price with interest, and for the amount of expenses incurred by him in connection with the transport and preservation of the sheep. (See

Voet, 21, 1, 4.) But it is contended on behalf of the plaintiff that the killing of some of the sheep amounts to an acceptance of the whole flock, which would debar the defendant from claiming back the price of the remainder. I quite agree with Mr. Searle that the acceptance of the sheep and payment of the price with knowledge of the breach of warranty would have been a bar to the *actio redhibitoria*. (See *Voet*, 21, 1, 11.) But the killing of some of the sheep, in the absence at all events of any other means of testing whether the condition of the contract had been complied with, does not amount to such an acceptance of the whole flock. If the price had been paid, the *redhibitory action* would have lain, but the price not having been paid, is the defendant entitled to rely upon the breach of warranty as a defence to the action for the price? I am clearly of opinion that, under the circumstances, he may; provided he pays the full price of those that have been killed and returns the remainder. (See *Murray v. de Villiers*—1 *Mons.*, 866.) The knowledge that a certain proportion of the sheep were in an unfit condition for a butcher's purpose was only acquired after some of them had been killed, and could have been acquired in that way only.

As soon as such knowledge was acquired the remainder of the flock, some of which gave indications by the udders that if killed they would be found to be in lamb, were tendered back. The Magistrate, in my opinion, correctly decided that the plaintiff was not entitled to recover more than the proportionate price of those killed.

As to the expenses claimed by the defendant, his claim in reconvention is really in the nature of a *redhibitory action*, but as he has not paid the price he merely seeks to recover the freight paid by him for the conveyance of the sheep and the wages and rent paid for their keep.

The Magistrate awarded the sum of £710s., which fairly represents the proportionate expenses incurred in respect of the sheep not slaughtered but tendered back to the plaintiff.

The appeal must therefore be dismissed with costs.

Their lordships concurred.

[Appellant's Attorney, C. C. Silberbauer; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

CHAMBERS V. CHAMBERS. } 1898.
} Nov. 3rd.

The Chief Justice said: With reference to the case of *Chambers v. Chambers*, which came before the Court a few days ago, a complaint has been made by Mrs. Chambers, the defendant, stating that she had received a notice from her husband to "leave the house and shop before four this afternoon"—that is, yesterday—failing which, legal proceedings will be taken against her. I think the plaintiff in that case ought to stay his hand. He did not ask for the custody of the child, and the woman says that if he turns her out of the place she and the child will be rendered homeless. I think this is a case in which the parties ought to come to some arrangement to allow her to remain in the business, and not to turn her out in the way in which it is proposed to do. This woman would be rendered homeless. The man has not proposed to take the custody of the child and yet he takes steps to turn the woman and child out of doors.

Mr. Graham said he would see the attorney who had instructed him, with a view to having such an arrangement made as the Court suggested.

GLAESER'S EXECUTOR V. QUIN.

Mr. Graham applied for the expenses of the plaintiff, a necessary witness, who came from Worcester to give evidence.

In reply to the Court, he said that notice had not been given to the other side.

The Chief Justice: We are not inclined to stretch a point in this case. It was a very paltry one and might very well have been tried in the Magistrate's Court.

CLIFTON V. TREASURER OF THE } 1898.
COLONY. } Nov. 3rd.

Government — Jurisdiction — Magistrate's Court—Act 37 of 1888—Waiver—Exception.

In an action brought in a Resident Magistrate's Court against the Colonial Government for a sum under £20, the defendant's agent filed an exception to the jurisdiction which, while admitting that the defendant

had agreed to the jurisdiction, added that in so doing the defendant had acted contrary to law.

Held, reversing the Magistrate's judgment, that the Government could lawfully renounce its right to insist upon actions against itself being instituted in the Supreme Court, that such renunciation must be clearly proved, but that the exception which admitted an agreement to submit to the Magistrate's jurisdiction ought to have been overruled.

Appeal from a decision of the Resident Magistrate of Knysna, in an action in which the present appellant, Dr. Clifton, of Knysna, sued the Treasurer-General of the Colony, as representing the Colonial Government, for the sum of £9 10s., being the amount of his account for medical attendance and medicines supplied by plaintiff to one Hans Rossouw whilst in the employment of the defendant as a driver in the Forest Department at Knysna, at the request and on behalf of the said defendant, the said Hans Rossouw having been injured while carrying out certain work and performing certain duties for the said department, directed to be performed, and for the performance whereof the said Hans Rossouw was engaged by the defendant.

From the correspondence which passed it appeared pretty clear that the Government were anxious to have the case tried and decided in the Resident Magistrate's Court, Knysna.

At the hearing of the case, however, the defendant's duly authorised agent excepted to the jurisdiction of the Court on the following grounds :

1. Plaintiff is claiming payment from the Crown in regard to the act of its servant.

2. Defendant has previous to case being placed in his agent's hand agreed to submit to the jurisdiction of this Court.

3. Defendant's agent, however, has, and again does inform plaintiff's attorney that defendant in so agreeing to submit to this Court's jurisdiction acted contrary to law, as Act 37 of 1888 does not give defendant any power to select his *forum*, and that Act expressly provides that no court except the Supreme Court has jurisdiction in such cases as the present one, unless and only when the Supreme Court shall have removed such case (*vide* section 4 of Act 37 of 1888). Wherefore the defendant, through his agent, now excepts to the jurisdiction of this Court on the grounds that until removed to this Court by the Supreme Court this Court has no jurisdiction in the present case, and defendant prays that this exception may be sustained, and the case dismissed

with costs. The Magistrate upheld the exception with costs.

The plaintiff now appealed.

Mr. Searle was heard in support of the appeal and contended that it was competent for the Government to submit to the Magistrate's jurisdiction. Act 37 of 1888 was never intended to oust the Magistrate's jurisdiction in every paltry case. Its object was to make Government liable for torts. Before the Act there was no special reason why the Government should be sued in the Supreme Court. He cited *Binda v. Colonial Government* (5 Juta, 254).

Mr. Giddy, for the Government, informed the Court that the agent at Knysna had excepted to the jurisdiction on his own responsibility, and that he (counsel) did not appear in support of the Magistrate's judgment.

The Court allowed the appeal.

The Chief Justice in delivering the judgment of the Court said : If the defendant's agent had contented himself with a simple exception to the Magistrate's jurisdiction I should have been inclined to uphold the Magistrate's judgment allowing the exception, because it is by no means clear that the defendant as Treasurer of the Colony did agree with the plaintiff to submit to the jurisdiction. But the defendant is bound by the terms of the exception which admits that he had so agreed, but adds that in so agreeing he acted contrary to the law.

Before the passing of Act No. 37 of 1888 the Superior Courts of this Colony had continually given judgments against the Government in cases in which such Courts would have had no jurisdiction unless the Government had submitted to such jurisdiction.

Since the passing of the Act all actions against the Government are cognizable by the Supreme Court, and may by that Court be removed to any other Superior Court or to any Magistrate's Court. This is a privilege reserved to the Government, which the Government may lawfully renounce by consenting to the action being instituted in any other Court which in other respects has jurisdiction to entertain the suit.

Such consent must be clearly proved, but an exception to the jurisdiction, which itself admits an agreement to submit to the jurisdiction, cannot be sustained.

The appeal must be allowed with costs, and the case remitted to the Magistrate's Court to be decided on its merits.

Their lordships concurred

Appellant's Attorneys, Messrs. Fairbridge & Arderne; Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

RICHOLD V. GARDNER.

{ 1898.
Nov. 8rd.

Interpleader—Summons—Exception—Execution creditor—Messenger—Damages.

A third party whose goods have been taken and sold in execution to satisfy a judgment of a Magistrate's Court does not, by reason of not having given notice of his claim to the messenger, forfeit his right to claim damages from the execution creditor if he can prove that such creditor, knowing to whom the goods belonged, had directed the messenger to sell the goods.

A summons in a Magistrate's Court alleged that the defendant, knowing that certain furniture belonged to the plaintiff, and after receiving written notice to that effect, wrongfully caused such furniture to be sold under a writ of execution against one G., and the summons further claimed damages for such wrongful act.

The defendant excepted to the summons on the grounds that he was not responsible for the execution of the Court and that the plaintiff, by not interpleading, had foregone his remedy. Held, on appeal, that the Magistrate ought to have overruled the exception.

Appeal from a judgment of the Acting Assistant Resident Magistrate for Cape Town in an action in which the present appellant sued the respondent in an action for £11 18s. 8d. damages.

The summons alleged that on or about the 1st day of May, 1898, the plaintiff leased or hired certain furniture to one Albert Gill, then in occupation of the Victoria Café, the property of the defendant.

That when such furniture was brought on to the property of the defendant, he was fully aware that such furniture was not the property of the said Albert Gill, his tenant, but was the property of the plaintiff.

That notwithstanding such knowledge the defendant wrongfully and unlawfully caused the said furniture to be seized and sold under a certain writ of execution dated 10th August, 1898, although previous to such sale the defendant received written notice from the plaintiff that the said furniture was his property.

That by reason of the premises the plaintiff has suffered loss and damage to the amount of £11 18s. 8d., which said sum of £11 18s. 8d. the defendant has admitted to be due and has promised to

pay, but the said defendant now refuses and neglects to pay. Wherefore the said plaintiff prays that the said defendant be adjudged to pay the same, with costs of suit.

The defendant excepted to the summons on the ground:

1. That the plaintiff has no cause of action against him, as defendant is not responsible for the execution of the Court's process against a judgment debtor who owed him the amount adjudged.

2. That the plaintiff in this action was aware of the execution, and should have interpleaded, and has therefore foregone his remedy. [The following authorities were cited in support of the exceptions: *Addison on Torts* (pp. 658, 664 (1879 edition), Act 20 of 1856, section 58.)]

As a plea the defendant denied the allegations contained in the summons.

The A.A.R.M. upheld the exceptions, and expressed the opinion that the plaintiff's proper action was to have availed himself of the simple remedy provided by section 58 of Act 20 of 1856.

The plaintiff now appealed.

Mr. Searle was heard in support of the appeal. As to the first exception he contended that it was clearly a matter of evidence.

There were numbers of English cases on the point showing the exact amount of interference which would make the execution creditor liable. See *Jarmain v Hooper* (6 M. & G, 850); *Scheepers v. Vigors, N.O.*, & *Hughes* (Buch., 1876, p. 201.)

The plea justifying the attachment under the judgment was bad in law.

The plaintiff was not obliged to interplead, he had given the defendant notice that the furniture was his and that was sufficient, and he could not be barred of his remedy because he did not interplead.

In the Superior Courts the execution creditor might be sued—*Freindlich v. Lippert* (decided in 1887, not reported).

The object of the interpleader action was to protect the messenger, to furnish an inexpensive method of deciding the issue, and to allow the ownership of the goods to remain in abeyance on security.

The messenger cannot afterwards be sued if the owner of the goods was aware of the attachment and allowed the sale to go through.

If a man does not interplead he loses the security of the goods; the creditor who has acted wrongfully may be a man of straw, but his wrongful conduct founds an action for damages.

Supposing the claimant knew nothing about the attachment until after the sale he would not be debarred from his remedy if he could show that the execution creditor had goods attached which he knew were not the property of the debtor,

It was all a matter of evidence. *O'Flynn v. Hendricks* (1 Ros, 164). The case should be remitted to the Magistrate.

Mr. Graham for the respondent: The Magistrate's view of the law was correct. The plaintiff should have given the messenger notice, when interpleader proceedings would have followed (Act 20 of 1853, section 58).

In all the English cases referring to the subject the property in the goods had been established by an interpleader suit. The appeal should be dismissed.

Mr. Searle in reply.

The Court allowed the appeal.

The Chief Justice said: When a third party claims goods taken in execution under the process of a Magistrate's Court, the 58rd section of Act 20 of 1856 affords an easy and simple remedy. The messenger reports to the Court that the goods have been claimed, whereupon the Court issues an interpleader summons to which the claimant becomes a party. But it does not follow that such third party necessarily loses his remedy altogether in case he fails to give notice of his claim to the messenger. The sale in execution will pass the property in the goods to the purchaser on delivery, but the former owner does not forfeit any right of action he might have for damages against an execution creditor who, knowing to whom the goods belonged, directed the messenger to sell them in execution. Such knowledge would be difficult to prove, especially if no notice had been given to the messenger himself, but where, as alleged in the summons in the present case, written notice has been given to the execution creditor himself he acts at his own peril if he directs the messenger to sell the goods. The exception that the plaintiff has no cause of action because he did not interplead ought not to have been allowed, and the appeal must therefore be allowed with costs, and the case remitted to the Magistrate to be decided on its merits.

Their lordships concurred.

[Appellant's Attorney, C. C. Silberbauer; Respondent's Attorneys, Messrs. Fairbridge & Ardena.]

GIE V. TRUSTEES OF LE ROUX. { 1893.
Nov. 8rd.

Magistrate's jurisdiction—Undue preference
—Insolvent—Ordinance.

A Resident Magistrate's Court has jurisdiction in an action for undue preference under the 84th section of the Insolvent Ordinance if in other respects the case falls within his ordinary jurisdiction under the 8th section of the Magistrate's Court Act.

Appeal from a decision of the Resident Magistrate of Worcester in an action in which the appellants were defendants and the respondents plaintiffs.

The respondents, the trustees in the insolvent estate of one Carolus P. le Roux, sued the appellants, Gie and Mattheus le Roux, for the return of one leaguer of brandy or payment of its value (£20), which brandy the insolvent delivered over to Gie (in return for a leaguer which Gie had previously given him) at a date when the plaintiffs alleged that the insolvent contemplated sequestration, and intended to prefer Gie over his other creditors.

The plaintiffs alleged in their summons:

1. That the said Carolus P. le Roux, who had been carrying on business as a farmer at Hex River in the division of Worcester, surrendered his estate as insolvent as per schedules dated 27th June, 1893. Notice of intention to surrender, dated 27th June, 1893, appearing in the "Government Gazette" of 30th June, 1893, and the order of the Honourable the Supreme Court dated 14th July, 1893, sequestrating the said estate amended by subsequent order gazetted 15th August, 1893.

2. That the plaintiffs were duly elected as joint trustees of the said insolvent estate on 29th August, 1893, which election was thereafter duly confirmed by order of the Honourable the Supreme Court.

3. That in the said month of June, 1893, and prior thereto, the said insolvent was unable to meet his just debts and liabilities and contemplated the surrender of his estate as insolvent.

4. That at that time, to wit in the month of June, 1893, the said insolvent was indebted to the said defendants in the amount of one leaguer of brandy, being due to them in lieu or return of certain one leaguer of brandy their joint and undivided property, or of which they were co-owners, lent by them with the consent, concurrence, and knowledge of both to the said insolvent in or about the month of April last past.

5. That in or about the 15th day of June, 1893, the insolvent, the said Carolus Phillipus le Roux, being in insolvent circumstances, and at that time contemplating the surrender of his estate as insolvent, and at a time when his liabilities fairly calculated exceeded his assets fairly valued, and within six months before the sequestration of his estate as insolvent, in order to and intending to unduly prefer the said defendants over and above the other creditors of the said insolvent, did alienate, transfer, cede, and deliver certain one leaguer of brandy his property to the said defendants, who took and received the same, being in lieu or return of the certain one leaguer of brandy referred to in paragraph 4 hereof.

6. The plaintiffs further say that by the said alienation, cession, transfer, and delivery of the said one leaguer of brandy referred to in paragraph 5 hereof the said defendants obtained payment of the debt due by the said insolvent to them, which by the provisions of the 84th section of Ordinance No 6 of 1848, in conjunction with section 8 of Act 88 of 1884, is null and void.

7. Plaintiffs lastly say that on the 28th and 29th days of September last past the said insolvent was charged before the Court of the Resident Magistrate of Worcester with a contravention of section 71 of Ordinance 6 of 1848, as defined by section 84 of the said Ordinance, in that by returning the said one leaguer of brandy to said defendants as hereinbefore stated, he intended to and did unduly prefer the said defendants before his other creditors, of which charge the said insolvent was duly found guilty and sentenced to two months' imprisonment.

Wherefore the plaintiffs pray that the said defendant may be adjudged and condemned by this Court either to deliver to said plaintiffs for the benefit of the said insolvent estate the said leaguer of brandy, or otherwise to pay the sum of £20 as the value thereof with costs of suit.

The defendant excepted to the jurisdiction of the Court on the ground that neither by Act 20 of 1856, which constitutes such Court and confers on it its jurisdiction, nor by any other Act or law has this Court any power to hear a case of the nature now before it.

The exception was overruled; the Court holding *inter alia* that if it had been the intention of the Legislature to exclude the jurisdiction in undue preference from R.M. Courts, special mention would have been made in Act 20 of 1856.

The plaintiffs' claim was construed by the Court into one of debt.

The Magistrate, however, at the request of the parties delayed the hearing of the case for the purpose of having the point as to whether a magistrate has jurisdiction to entertain an action of undue preference decided on appeal.

The defendants now appealed.

Mr. Searle was heard in support of the appeal. He contended that the Magistrate had erred in overruling the exception, as he had no jurisdiction to try an action for undue preference.

Act 20 of 1856 repealed Ordinance 88 of 1827, which was in force at the date when Ordinance 6 of 1848 was passed.

Under the repealed Ordinance Resident Magistrates had jurisdiction in all civil cases in which the claim did not exceed £10.

By Act 20 of 1856, section 8, jurisdiction was conferred up to £20, but only in cases of debt and damages. This is still the section to be looked to, as Act 48 of 1885, section 5, sub-section 6, did not

alter the nature of the action in any way but merely increased the amount.

Resident Magistrates' Courts are purely Statutory Courts, and their powers must be sought within the limits of the Act by which they were constituted.

The present case is not one of debt or damages, it is a claim by virtue of a Statute which enacts that under certain circumstances a given transaction shall be null and void. (See Ordinance 6 of 1848, section 84.)

A Magistrate has no jurisdiction in insolvency save where it is specially given.

The 84th section must be read in the light of the 86th, 88th, and 89th sections. Section 88 refers to forfeiture which may be ordered, but clearly not by a Magistrate, as it is a declaration of rights.

The 89th section says in any action that may be brought under the 84th section it shall be lawful for the trustee to claim a declaration that there shall be a forfeiture of defendant's claim on the estate.

The Insolvent Ordinance never contemplated that a Resident Magistrate, whose jurisdiction was then limited to £10, should have these powers of administration in connection with an insolvent estate.

In the present case, one reason no doubt why the plaintiffs wish to bring the action in the Resident Magistrate's Court was because the Resident Magistrate had, according to the summons, found that there had been an undue preference, but there special jurisdiction had been conferred upon him for that purpose, but this has not been done in *civil* cases.

As a matter of practice these cases are never heard by Magistrates.

Under section 187 of the Insolvent Ordinance a large number of the functions of the Supreme Court in insolvency matters may be delegated to one Judge by Rule of Court, but undue preferences must be heard before the full Bench. The exception was a good one and should be upheld.

Mr. Graham, for the respondents: Between the years 1848 and 1856 magistrates had jurisdiction in cases of undue preference where the claim did not exceed £10.

The jurisdiction was extended by Act 20 of 1856, and as the present claim is in the nature of a debt the Magistrate clearly had jurisdiction under section 8 of the Act.

He referred to *Scott v. Trustee Insolvent Estate of Nicholson* (6 E. D. C., 248.)

Mr. Searle in reply.

The Court dismissed the appeal.

The Chief Justice said: The Insolvent Ordinance itself is silent upon the question whether

Resident Magistrates' Courts have jurisdiction in cases of undue preference under the 84th section, and therefore we must fall back upon the Magistrates' Court Act in order to determine that question. The 8th section of the Act is wide enough to include such cases if the amount or value of the undue preference does not exceed £20. One argument used against the jurisdiction is that in actions for undue preference it may become necessary to decide whether the defendant should forfeit his right to prove his debt against the insolvent estate, and that it could never have been intended that questions of forfeiture should be tried in an inferior Court. That, however, is no reason for ousting the magistrate's jurisdiction in cases of undue preference where there is no claim for forfeiture. As to the other argument, that questions of undue preference frequently raise questions of great intricacy and difficulty, if it were to prevail, the magistrate's jurisdiction would have to be excluded in a great many other cases in which it undoubtedly exists. Only recently this Court had to determine an appeal from a Magistrate's Court relating to the sale of sheep which raised very intricate questions of law and fact, but in which no doubt as to his jurisdiction could be entertained. In deciding that the Court below had jurisdiction in the present case we do not mean to intimate that there has been an undue preference. An important question may arise whether the return of a leagner of brandy by the borrower to the lender in the ordinary course of business should not be deemed to have been a *bona-fide* transaction, so as to throw on the trustee of the borrower's insolvent estate the burthen of alleging and proving collusion in terms of the 87th section of the Ordinance, but this question will, I doubt not, be carefully considered by the Magistrate. The appeal against his judgment, which overruled the exception to his jurisdiction, must be dismissed with costs.

Their lordships concurred.

[Appellants' Attorneys, Messrs. Van Zyl & Buissinac; Respondents' Attorney, C. C. Silberbauer.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

FERGUSON V. COLQUHOUN. { 1898.
Nov. 9th.

Mr. Oastens moved for judgment for £66 15s. 1d., with interest, under rule 829.

Granted.

ADMISSIONS.

Ex parte NIXON.

Mr. Rose-Innes, Q.C., moved for the admission of Mr. Wm. Thomas Nixon as an attorney-at-law.

Mr. Nixon took the oaths, and was duly admitted.

Ex parte ALING.

On the motion of Mr. Barber, Mr. E. B. Aling was admitted as a sworn translator in the English and Dutch languages. The oaths to be taken before the Resident Magistrate, Barkly East.

REHABILITATION.

The following rehabilitation was granted on the motion of Mr. Maskew:

William Marthinus Behrens.

GENERAL MOTIONS.

In re THE MINOR MARTHA M. STEYN.

Mr. Searle moved for the appointment of a curator to represent the said minor in the sub-division of certain lands in the division of Aliwal North, of which one of the owners owns an undivided ninth share, it having been agreed that each of the owners shall receive a defined portion, and the parents of the said minor being unable to act through mental infirmity.

Affidavits having been read.

The Chief Justice: The Court will appoint the petitioner curator *ad litem*, for the purpose of protecting the minor in the partition.

THE SECRETARY OF STATE FOR
WAR V. METROPOLITAN AND
SUBURBAN RAILWAY COMPANY { 1898.
Nov. 9th.
AND WALKER.

Practice—335th Rule of Court—Affidavit—Evidence.

This was an application on notice calling upon the respondents to show cause why the affidavit of

Colonel George Philips, Royal Engineers, late Commanding Royal Engineer in South Africa, sworn in London on the 9th May, 1898, might not be read and admitted as evidence at the hearing of the trial in the above suit.

The facts are these :

On 11th September last the Court granted an order continuing the interdict obtained against the defendant company, restraining them from passing transfer to John Walker of certain pieces of land expropriated for railway purposes at the back of the Amsterdam Battery, Cape Town, until the 15th instant, but to be dissolved at that date unless the War Department, before the 15th instant, obtained an order from the Court making the interdict perpetual.

The General Officer Commanding immediately after the order was made sent a full report of the matter to the War Office, London, at the same time asking for instructions, and on the 17th October last he received a cable instructing him to continue the proceedings.

On the 18th October, immediately on receipt of the cable message, summons was issued and the case set down for the 14th instant. Subsequently an agreement was come to between the parties, by which the interdict was to continue until after the trial, which was fixed for the 20th instant.

The applicant alleged that Colonel Philips was a necessary witness in the suit, but that owing to the order above referred to it was impossible to secure his presence at the trial, and there was no time to apply for a commission to take his evidence in London.

Under these circumstances applicant's attorneys wrote to the respondents' attorneys, asking them to admit as evidence at the trial an affidavit sworn to by Colonel Philips in London on the 9th May last.

The respondents' attorneys refused to admit the affidavit, on the grounds that "Colonel Philips had clearly forgotten the circumstances of the case when he made his affidavit, as the statements therein contained were at variance with the documentary evidence in the respondents' possession, and would be considerably modified were Colonel Philips to have an opportunity of perusing same, and his memory refreshed as to some of the other circumstances referred to in his affidavit."

The applicant alleged that unless the affidavit was admitted, or leave granted to take the evidence of Colonel Philips on commission, the plaintiff would be greatly prejudiced in proving his case.

That a copy of the affidavit was in the possession of the defendants' attorneys, and had been for some time, as it was used when the matter was before the Court on motion.

Mr. Rose-Innes, Q.C., was heard in support of the application, and relied on Rule of Court 885.

Mr. Searls and Mr. Sheil for the respondents.

The Court intimated that the order would not be granted unless the respondents' counsel consented; at the same time it was very desirable that Colonel Philips's evidence should be heard or taken on commission.

After consultation, the respondents' counsel consented to the affidavit being used at the trial rather than that the case should stand over for three months longer, and the application was accordingly granted, costs to be costs in the cause.

[Applicant's Attorneys, Messrs. Van Zyl & Buissonné; Respondents' Attorneys, Messrs. Wessels & Standen.]

Re THE HORO CONCESSION EXPLO- { 1898.
RATION COMPANY. { Nov. 9th.

Mr. Innes, Q.C., presented the further report of the liquidator of the said company made in terms of section 164 of the Companies Act, 1892. Counsel said this was a report under the new Act, by which the liquidator was required to make a preliminary report. As a matter of fact, in England the report was handed in to the Registrar, and if there was anything to be inquired into a special report was made to the Court, but otherwise the Court was not troubled with the report. That was done under a rule framed, and he suggested that would be a convenient course to adopt here, for in this case nothing was wrong with the estate, and nothing needed inquiry; therefore no order was sought.

The report was received.

OLLIVER V. OLLIVER. { 1898.
{ Nov. 9th.

Mr. Webber moved for a rule nisi requiring the respondent to show cause why applicant, his wife, shall not be admitted to sue *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce.

In reply to the Court, counsel said that applicant was a needlewoman.

The Chief Justice: Has any attempt been made to get the husband to contribute?

Mr. Webber: I do not know that application has been made to him, but inquiries show that he is not in receipt of any wages at present.

The Chief Justice: We want further information in this case as to what the woman is earning, and as to whether the husband has been asked to contribute to the expenses of this suit.

IN THE INSOLVENT ESTATE OF JACOBUS J. ALBERTS.

Mr. Searle moved for authority to the Master to call another meeting for the election of a trustee

of the said estate, no election having been agreed upon at the second meeting held, otherwise for the appointment of John Cairncross as provisional trustee, with power to liquidate the estate.

An order was made for another meeting of creditors.

Re MINORS VAN BREDA. { 1893.
Nov. 9th.

Mr. Molteno moved for authority to the mother of the said minors to dispose of their share in certain landed property situated at Wynberg, the same being vacant and unproductive, on condition that the proportion of the purchase price accruing to them be paid into the Guardians' Fund, less such costs as the Master may approve of.

Affidavits and the Master's report having been read,

Mr. Molteno said, in reply to the Court, that there was a guarantee that villa residences would be erected, no one building to cost less than £500. The price arranged was £100, which the affidavits said was a fair value.

The Chief Justice: The Court will authorise the sale upon the assumption that there is some guarantee that proper residences are built on the land. Because if anything but proper residences are built, it will certainly diminish the value of the rest of the property, and if proper residences are erected it will increase the value; and merely because it does so, we will make the order. Although this is not the full price of the property itself, it may be the means of enhancing the value of the rest. The guarantee that proper villa residences will be erected is to be annexed to the transfer.

IN THE INSOLVENT ESTATE OF { 1893.
WOOD BROTHERS. { Nov. 9th.

Mr. Innes, Q.C., moved for an order appointing Frederick Hoffa as provisional trustee of the said estate, with full power of administration and final liquidation thereof, no election having been made at the second meeting of creditors.

The Chief Justice: We shall appoint Mr. Frederick Hoffa provisional trustee, and grant a rule nisi calling upon Mr. J. C. van den Heever and Mr. J. H. van Rooyen to show cause, on the 23rd November, why Mr. Frederick Hoffa shall not finally administer and liquidate the estate. If there is no appearance on that date, the rule will be made absolute with costs out of the estate. If no cause is shown, there will be no necessity for a further application.

Re THE MINORS MUNRO.

Mr. Barber moved for authority to the Master of the Supreme Court to pay out to the mother

of the said minors the amount awarded to them out of the estate of their late father, towards their maintenance and education, the mother being in poor circumstances and the sum in question of small amount.

From the affidavit it appeared that there were eleven children, and the amount awarded to them was only £40 10s.

An order was granted as prayed.

Ex parte ARDERNE. { 1893.
Nov. 9th.

Lost Bond — Certified copy — Registrar of Deeds.

Where it is sought to release a portion only of property hypothecated under a lost bond, the remainder of the property still being mortgaged, the authority of the Court must be obtained before the Registrar of Deeds will issue a certified copy of the bond, no provision being made for such a case in the Regulations framed under the Deeds Registry Act, 1891.

Petition of Henry Mathew Arderne, of Cape Town.

On 15th May, 1883, the petitioner advanced to Catharina J. J. Cormack, married without community of property to William Lawson Kingon, at the latter's special instance and request, a sum of £1,000, and in order to secure payment of the same the said Catharina J. J. Kingon duly passed and executed a deed of hypothecation for the said sum before the Registrar of Deeds on the 15th May, 1883, specially hypothecating certain lots of ground situate at Sea Point being parts of the estate "Sea Point," and more fully described in a certain deed of transfer thereof made in favour of the said C. J. J. Kingon on the 26th April, 1883.

The petitioner alleged that he had lost or mislaid the aforesaid bond, and that although he had made diligent search for it during the past two years he had been unable to discover it.

That the property* mortgaged in and by the said deed had lately been sold, and it was necessary to give immediate transfer to the purchasers thereof.

That it was necessary for the petitioner as holder of the bond to give his consent to such transfer in order that he might release the same from the operation of the bond, and that it was further necessary to produce to the Registrar of Deeds the original bond or a duly certified copy thereof.

* Only a portion of the property mortgaged was sold and such portion only was sought to be released from the bond.—Rep.

That the Registrar had intimated to the petitioner that he could not issue certified copy without the consent of the Court.

That the bond had not been ceded by him (the petitioner) or by anyone on his behalf, and that it had wholly remained his property.

The prayer was for an order directing the Registrar of Deeds to issue to petitioner a certified copy of the bond for the purposes above mentioned.

Mr. Rose-Innes, Q.C., was heard in support of the application.

The Registrar of Deeds, who was present pointed out that an order of Court was necessary, as no provision to meet such a case had been made in the regulations framed under the Deeds Registry Act, 1891.

The Court, the Registrar of Deeds consenting, granted the order as prayed.

[Petitioner's Attorneys, Messrs. Fairbridge & Arderne.]

HENNING V. HENNING. { 1893.
Nov. 9th.

Mr. Currey for the plaintiff; the defendant in default.

This was an action by Susanna L. Henning against her husband for restitution of conjugal rights, failing which, for divorce, for the custody of the children, and the division of the property held in community. The parties were married at Burghersdorp on the 24th of January, 1883, and there were four children of the marriage. Defendant maliciously deserted plaintiff about the end of 1891.

Mr. Norman Lacy produced the original certificate of the marriage.

The evidence of the plaintiff, taken on commission at Burghersdorp, was read. She stated that they were married in community of property. After the marriage they resided at Aliwal North until December, 1890, and afterwards for some time at Bethlehem, in the Orange Free State. After four months her husband sent her and the children back to her parents at Burghersdorp and went to Johannesburg, from which he went in a few weeks to Mashonaland. In December, 1891, he wrote from Mafeking, and said it was uncertain when he would write for her to come, and she had not heard from him since. She had written to friends in Mashonaland, and they had replied that they could not ascertain his whereabouts. Since the proceedings commenced she had heard from his father that he was at Tuli.

The Chief Justice: It may be that he is now engaged against the Matabele.

Mr. Currey: It may be.

The Chief Justice: Is that the only evidence?

Mr. Currey: Yes.

The Chief Justice: The evidence of malicious desertion is very slight. Of course if the man is engaged in military operations he may not be able to return for a long time. We shall make an order for the restitution of conjugal rights, defendant to return to plaintiff or receive her on or before the 1st of November, 1894; failing which, take a rule nisi calling on the defendant to show cause on the 30th November, 1894, why a decree of divorce should not be granted, the plaintiff to have the custody of the minor children, and a division to be made of the property held in community.

ST. MARC V. HARVEY. { 1893.
Nov. 9th
and 10th.

Par delictum—Fraud—False Representation—Damages.

A party to a contract, the object of which is to obtain money from the public by the exhibition of a diminutive child of ten as being a human phenomenon sixteen years of age, is not entitled to recover damages for its breach by the other party, even although it be proved that the defendant was fully aware at the date of the contract what the true age of the child was.

A plaintiff in an action for damages for false representations is not entitled to succeed if it be proved that he was not in fact deceived by such representations.

This was an action for £522, damages for breach of contract.

The parties to the suit entered into a written agreement in London on 28th April, 1893, in terms of which the defendant agreed to engage from the plaintiff the exclusive services of Princess Topaze, with the two ponies, known as the "Ginnet Ponies," at that time being exhibited at the Westminster Aquarium as the "Two Smallest Ponies in the World," with the harness and barouche, and the services of the coachman and groom, Wm. West, for the term of twenty weeks, to give exhibitions and entertainments twice daily, three hours each day (if required), throughout South Africa.

The defendant to pay the plaintiff £80 per week from the first show in South Africa, and 10 per cent. on the receipts of each entertainment and exhibition, payable weekly, throughout South Africa. The defendant further agreed to pay in advance £100 before the plaintiff's departure from London, for loss of time at sea, also the first-class fares of the plaintiff, Princess Topaze and her mother, a third-class fare for the groom, and the fares for the miniature ponies and carriage.

It was further agreed that the defendant should pay the hotel board and lodging, and stabling for the ponies, and all the transit throughout South Africa for the plaintiff's company and return to London.

The plaintiff to have the exclusive sale of the photographs of the Princess Topaze, and the sole profits of the same.

The plaintiff agreed that should he not fulfil his part of the contract, or wish to terminate it before its expiration, he would pay the defendant or his executors the sum of £500, and forfeit the payment of his return fares from South Africa to England.

The plaintiff, in his declaration, alleged that he had faithfully carried out his part of the contract, and was still willing to perform it, but that the defendant in or about the month of September, 1893, and at Burghersdorp, wrongfully and unlawfully refused to carry out his engagements there under, and gave notice to the plaintiff that he repudiated the said contract, and refused any longer to be bound by its terms. The plaintiff claimed £522 damages (particulars of which were in a schedule annexed to the declaration) with costs of suit.

The defendant, after admitting the formal allegations contained in the declaration, specially pleaded that he was induced to enter into the contract by the false and fraudulent representations of the plaintiff, to the effect that the said Princess Topaze was, at the date of the said contract, a midget of the age of about sixteen years, and that the facts as to the age and history of the said Princess, contained in a certain pamphlet or biography compiled by the plaintiff and published at his instance, were true and correct, that the said pamphlet was handed to the defendant by the plaintiff at the time that the said contract was entered into, and the plaintiff further promised and undertook to supply to the defendant for exhibition to the general public a certificate of the registration of the birth of the said Princess, whereas in truth and in fact the said Princess was no midget, nor of the age of about sixteen years, but a child under ten years of age, and the facts contained in the said biography were false, as the plaintiff then well knew, and the plaintiff thereafter neglected, failed, and refused to supply the said birth certificate.

The defendant further said that in consequence of his discovery of the fraud and deceit practised upon him he refused any longer to be bound by the said contract, and gave notice to the plaintiff that he repudiated the same, as he was entitled to do. The defendant further said that by reason of the facts above set forth, the plaintiff was not entitled to recover any sum of money from him, and he specially denied that the plaintiff had

sustained the damages in the schedule set forth, or any portion thereof.

Wherefore he prayed that the plaintiff's claim might be dismissed with costs.

And for a claim in reconvention, the defendant said that by reason of the false and fraudulent representations of the plaintiff he had suffered serious loss and damage in his business in the sum of £500, for which amount he claimed judgment with costs.

Mr. Rose-Innes, Q.C., and Mr. Graham appeared for the plaintiff, and Mr. Searle and Mr. Tredgold for the defendant.

Mr. Innes submitted that as the onus was on the defendant he should open his case.

The Court ruled that the plaintiff should first give evidence as to his alleged damage.

The plaintiff deposed that the £30 in the schedule was for one week's salary, £8 for the 10 per cent. of the takings of the sixteen weeks, £120 was for four weeks yet to run, £68 for percentage calculated on average of former takings. For the sale of photos he claimed £21 a week. He sold since he came from Burghersdorp about £24 worth of photos. For hotel expenses for four weeks he claimed £44, travelling expenses £25, and return fares to England £140, for himself, the Princess, her mother, the coachman, ponies, and barouche.

By Mr. Searle: I have been with the Princess managing for a year and some months. I could not have said before the Magistrate that I had been her manager for two years before I met Mr. Harvey. I have been now with her for about two years. I first met the Princess in France, and she was then twelve. After I had been with her about eight months, her mother told me on the Continent that she would be ten years old in August, 1893. She must have been past nine when I first saw her. I exhibited her in Madrid, in Paris, in Italy, in some big towns in England and Scotland, and afterwards in the Aquarium. I did not advertise her as sixteen years old; it was done by the directors who had charge of the exhibition. It was so advertised in the "Daily News" and "Telegraph" and other papers.

By the Court: I don't know who told the manager of the Aquarium for purposes of advertisement that the Princess was sixteen.

By Mr. Searle: He had been living with the Princess's mother for some time. In Berlin he had a biography compiled by a man, who understood English, to whom he gave French papers for the purpose. It stated that according to her birth certificate she was between fifteen and sixteen years; that she was brought up on the bottle till the age of nine, at which age she stopped growing, having obtained her maximum

height, and that she was a perfect woman in miniature. The biography went on to say that she herself fixed the age at which she would show, that her brothers and sisters were all of large stature, that her father was quite a giant and her mother a very robust person. Plaintiff said these were sold in England for 1d., but most of them were distributed. The circulation of the biography was large, about 80,000 copies a year were sold and distributed.

There is no difference between sixteen years and nine in your line?—It is usual to increase the age. No manager would do otherwise. It is always done. Out of twenty managers, not more than one would give the correct age.

The Chief Justice said the question was not what was the custom, but did Mr. Harvey know that plaintiff was misleading the public. Did the plaintiff tell him the child's age?

Plaintiff said he did so in Mr. Harvey's room.

Mr. Searle: You said before the Magistrate, "We did not speak of the age"?—He did not speak of it; I did. Witness further stated that the usual advertisements of the Aquarium performances were inserted by the managers, who were always anxious to put the age up. It would be impossible to show midgets if the truth were told about them. Defendant was an experienced showman. He told witness he had been in the midget business for fifteen years. He did not ask for the birth certificate, at the time the contract was signed. He knew her age. Four months afterwards, at Burghersdorp, was the first time he mentioned the certificate. Witness found out her age to be eight and a half when he was making the contract for her at Marseilles, eight months before he came to London. He heard it from her mother; he never had a certificate of her age. The gentleman who wrote the biography for him invented a good deal, but he knew the contents when he sold it. When Harvey spoke about the age of the Princess he said she was about nine or ten.

You stated before the Magistrate that Harvey never spoke to you about it?—No, I spoke to him.

Do you go so far as to say that when Harvey entered into the contract he knew the child was not ten?—Yes.

You know as a fact that the law in England prevents the performance of children under ten?—No, because she was exhibited at the Aquarium.

Wasn't it because of that law she was advertised as sixteen?—No, it was done by the directors.

Plaintiff stated further that he had obtained £779 from the defendant, including £100 paid in London, besides his expenses. He was exhibiting the Princess now, and selling her photographs. He did not give Harvey a copy of the biography.

He had one which he might have picked up at the Aquarium. When the show was opened in Cape Town defendant did not ask for the certificate in presence of Johnston, the advance agent. He did not tell defendant from time to time that it was coming by steamer. He never heard it said by the public that the Princess was a child and not a young woman. The public were very fond of her in every town in Europe, they shook hands with her and bought her photograph. It was considered very wonderful that a child of her age could sing and dance as she did.

Mr. Justice Buchanan: Was she advertised here as sixteen?

Mr. Searle: Yes. She was advertised as a little lady.

Witness said she was advertised as the smallest lady in the world. That was done because all managers did it. It was not a fraud on the public because the public knew and laughed, and never believed it. None of them ever said she was a child. They were too polite to say so before the Princess. They simply shook hands with her and said she was wonderful.

Mr. Searle produced copies of the "Argus" and "Star," in which the Princess was advertised as sixteen years.

The witness said that Mr. Harvey advertised her as sixteen years in Johannesburg, and eighteen in Pretoria. He had different accounts of her height, varying from twenty inches to twenty-six.

Mr. Justice Upington: Who put these advertisements in?

Mr. Searle: We did, my lord, upon his representations.

Witness said he had produced a certificate of the marriage of the Princess's mother, which took place in 1886.

Re-examined by Mr. Innes: Harvey drew up the advertisements, posters, and programmes, saying she was 20 inches, 26, and 28. He came to the Aquarium to measure her, marking her height against his leg. He told him in his office before the contract was signed that the real age was ten. He said he knew all about making up midgets. Before leaving London the Princess wore long dresses, but at an invitation to dinner with Harvey she wore a short dress, and he told witness to put her in long dresses. Coming over on the steamer Harvey told him to take care her mother said nothing about her age, and he wanted to keep the Princess in her cabin all the time, but witness would not consent to that. Sometimes she was carried about the ship by her mother or the stewardess, and Harvey objected to this, saying it made her look like a child. They did not do well in Cape Town and other places because a midget, Major Jackson, had been there just before them, and spoiled the market. He was very little, and

very wonderful. They did best in Bloemfontein and Pretoria, where he had not been exhibited.

Mr. Justice Upington: Did the defendant manage Major Jackson?—No; he had another called General Tot.

By Mr. Innes: He was obliged to make the prices low. Instead of 7s. 6d., which he expected to get, he had to make it 2s., 2s., and 1s., and then he only took £4 the first night. The three or four weeks before defendant repudiated the contract were bad weeks. After a disastrous day at Graaff-Reinet they came to Molteno. It was the day on which witness should receive his weekly money. Defendant then said the business was ruination, and asked him to forego his 10 per cent. on the receipts, but he refused. Defendant then said he could say he did not know the Princess's age when he made the contract, and that that would bring witness into bad repute in the Colony. Witness said he was much disgusted with defendant's conduct, and gave certain orders with reference to the Princess and ponies which would prevent the performance until his salary was paid. He was paid before he left Molteno, and he allowed the show to go on. They went to Aliwal North, and from there to Burgersdorp, where the defendant again asked him to forego the 10 per cent., saying that business was very bad. Witness refused, and defendant said he could get him into trouble. A letter was then written to plaintiff by defendant's agent, saying that he had misrepresented the age of the Princess. Defendant had told me that he exhibited one midget of eight years as fourteen, and another of twelve as twenty, and that he had given incorrect ages in the case of Princess Mignon (another midget) and General Tot, who was now in the Orange Free State.

The Chief Justice pointed out that if the contract was entered into to deceive the public, there would be a question as to whether either party could recover under it.

Mr. Innes: We must see what Mr. Harvey has to say.

Witness stated that nothing was said as to what Harvey was to advertise. In exhibiting, witness had nothing to do with the advertisements.

Madame Hamis deposed that she was the mother of the Princess Topaze, who was in her eleventh year. She was ten on the 31st August. She made the acquaintance of Mr. St. Marc at Pau. The child was then exhibited, and the managers were told the true age, and made any statement about it to the public that they chose. She saw Mr. Harvey come to the Aquarium, and measure the Princess and her ponies while exhibiting there. He had seen witness several times, but never asked for the age. She had short dresses for the child, and Mr. Harvey objected and said she

should be dressed like a little woman, because otherwise the people would not believe that she was sixteen years of age.

The Chief Justice: And did you consent?—Certainly.

Examination continued: On board the ship Mr. Harvey wished them to confine the little lady to her cabin, but Mr. St. Marc would not consent. There were on board some French ladies, and Mr. Harvey, who could not speak French, sent Mrs. Harvey to tell her that she ought not to tell the correct age of the Princess, as it would spoil business. When coming through the heat of the tropics they did not keep the long dresses on the child. Harvey objected, but they insisted. In the Colony Mr. Harvey said he could not believe that she was ten; he thought she was only six or seven. He always spoke of his previous midgets; one of his stories was that when he was exhibiting Ama Baines as fifteen at Bristol the midget's father, who sometimes drank, rose in the audience and said she was only eight. Mr. Harvey was very angry, and said if he was a younger man there would be a duel. At Port Elizabeth the defendant said that as business was bad he would be always able to cancel the engagement.

By Mr. Searle: She had been living for some time with plaintiff. She was married in 1885, but left her husband because he ill-treated her. The Princess was born before her marriage. She was exhibited in a long dress and obignon in London as a young woman.

(At this stage the plaintiff carried the Princess Topaze into court.)

The Chief Justice: What was the chief attraction for the public?

Mr. Innes: Her singing and dancing.

The Chief Justice: I rather think if that is so it would have been better for their own interest to make her appear as young as possible.

Mr. Innes: I suppose there were attractions in both.

Mr. Justice Buchanan: Then the physical phenomenon was one attraction, the singing and acting another.

(At the request of the Court the Princess was placed standing on a small table between the Bench and the Bar, and in reply to a question by Mr. Innes said she was ten years old. She failed, however, to answer—on being faced round to the clock—what time it was.)

The Chief Justice: I should think it would make very little difference to the public what age she was if she is very intelligent, being so young.

Mr. Searle said their contention was that she was not intelligent.

The Chief Justice: Does she sing?

Mr. Innes: Yes. She can sing in English and in French, and she can dance.

The Chief Justice: There is not much room where she is standing now for dancing, but she might give a song.

Mr. Innes requested the Princess to sing a song, whereupon she at once sang "Ta-ra-ra-boom-de-ay," to the evident enjoyment of the judges, barristers, and public. At the conclusion of her vocal effort the little lady was removed.

E. H. Harvey, the defendant, deposed that he saw the advertisements in the London daily and weekly newspapers with reference to the Princess Topaze's performance at the Aquarium. He saw her there dressed as a young woman. He met Mr. St. Marc, and had several interviews with him, in one of which the biography produced was brought to his house. Plaintiff told him she was between fifteen and sixteen, and that she would be sixteen on August 31. He said a birth certificate would be procured from France. When the contract was drawn up he believed she was fifteen. He would not have entered into such a contract if she was only nine. He could not do so legally in England. He engaged her as an extraordinary human phenomenon. There was nothing remarkable about her singing or acting, and though bright, she was not exceptionally intelligent. There were 200 children in London swept away by the Act for the Prevention of Cruelty to Children who were much superior to her. He engaged her as the smallest lady in the world, as a diminutive adult. When he arrived in the Colony he took £28 the first night in Cape Town, not £4, as stated by plaintiff. Johnston, his "plan man," when asked what the public thought of the performance, said they were delighted with the General, but said the Princess was a child. He on that occasion asked St. Marc again for the certificate. The discrepancies in the height were explained by the fact that advance posters and advertisements were taken from the London papers' advertisements. He found these were incorrect and made alterations subsequently. The complaint as to the Princess being a child was made in nearly every town, and he was very angry about it, and complained frequently to plaintiff. He said, "You need not get into a passion, I will produce the certificate," and he made excuses about the mails crossing. The business was a fair success, but General Tot saved the show. That was up to Melteno, where matters came to a crisis. Witness said he would have to get the certificate, as people were getting under the impression that he was perpetrating a fraud. He said his reputation of twenty-one years' standing in South Africa was at stake, and he could not leave the country with that smudge on it. St. Marc said, "The reputation you have in South Africa is the reputation of the

savage. They are all savages here, and what do you care for them?"

By the Court: I was fully under the impression that he would have the certificate sent out from France, he made so many promises.

Examination continued: His own opinion, backed by that of medical men, was that she was between seven and eight years of age. He had paid £779 and expenses. Had she been what she was represented, he would have made £2,000 profit. Everyone in South Africa would have gone to see her. He had never been with midgets in South Africa before, but brought minstrel, grotesque, and opera troupes. He would have cut his hand off before committing such a fraud on the public.

The Chief Justice: If a simple country public were able to discover that this was a mere child, how is it that you, an experienced manager, were deceived?

Witness: In a large city like London people go to a performance and say no more about it, but in a small town like Cape Town, where you are all one family on the morning after a performance, everyone knows all about it.

The Chief Justice: Hearing the voice of that child, I am quite astonished that, with your experience, you should be taken in in London.

Witness said most of these midgets had very weak, piping voices.

By Mr. Innes: He exhibited Anna Baines at Bristol, but her story about her age was untrue. Lucy Serate died in a snowstorm in the Sierra Nevada. She was sixteen; he had a certificate of her birth. An interview in the "Standard and Diggers' News" at Johannesburg, stating that he met the Princess five years ago, was incorrect. He never told the newspaper man that Alexander Dumas had told him the Princess had not grown one-sixteenth of an inch in nine years. Newspaper interviews should be taken with a grain of salt. [A report of his performance was read by Mr. Innes, in which it was stated that the Princess was born in Paris, whereas the biography said Buenos Ayres.] The witness said that another statement was that she was born in Belgium. He never said, as reported, that she was eighteen years of age. He might have stated that she was an instance of arrested development, but did not state that she had not grown since she was fourteen months, and that her mother used to exhibit her on the palm of her hand. He had been told that one of the ponies, 6½ hands high, came from the stables of the Baroness Burdett-Coutts, and he had repeated it. He advertised General Tot as an American of twenty-six years, at his own request. He was a German. He did not believe his age was only nineteen.

By Mr. Searle: He did not order the child to wear long dresses in order to conceal her age. He thought it indecent to see a young woman of fifteen or sixteen running about the decks in short skirts, or being carried about in people's arms.

By Mr. Innes: The profit of the show was £800. He had not sent the money to England. He could only draw a cheque for about 1s. 9d. The money was swallowed up in expenses. He was not anxious to terminate the contract.

By the Chief Justice: There was nothing in the public newspaper criticisms to say that the child was other than a young woman. Everybody who went out and said she was a child prevented twenty others coming in.

The Chief Justice thought the public would form their own opinion from the criticisms in the press.

The witness said he did not believe they had much effect on the general public.

James Alfred Johnston, who accompanied the exhibition as business manager, gave evidence as to the request by defendant after the first performance in Cape Town that plaintiff should procure the birth certificate to be framed and placed outside the show.

This concluded the evidence.

Mr. Innes, Q.C., for the plaintiff, submitted that the onus lay upon the defendant to show that he was misled into entering into the contract by fraud or misrepresentation on the part of the plaintiff, and in order to do so he would have to show that fraudulent mis-statements were made. It was quite impossible to justify all the actions and conduct of the plaintiff in this case.

The Chief Justice said they did not wish to hear Mr. Innes on that particular point. The difficulty they had was on the question of *par delictum*. Supposing they were both equally cognisant of the fact that the child was of this age, and that they both agreed to deceive the public, how could either recover under the contract?

Mr. Innes said the law stated that certain contracts should be void. Contracts to pay gambling debts were void in England by statute, and in the Colony they were void under the common law, as being against public policy—that is, the parties contracted to do something which the law said they should not do.

The Chief Justice: Supposing there was an arrangement between two persons, by which they agreed to deceive the public by misrepresentations, and to obtain money, would that be a contract upon which either of them could sue the other?

Mr. Innes asked was the contract such that the public could recover the money obtained by such false pretences. The Court would not say that any misrepresentation such as high colouring and exaggeration would make the contract void.

GGG

Supposing a man trained a horse to perform wonderful tricks, and called him a mustang from the prairies, when as a matter of fact he came from Koeberg. If he hired it to a showman who called it a mustang—because the truth would not induce the public to attend—and put what he called an Indian on its back, would that be regarded as a fraud on the public, and the contract one under which the parties could not recover?

The Chief Justice: Even in that case would not any person who paid for admission be entitled to recover his money?

Mr. Innes submitted that if the Koeberg horse performed as well as a mustang the admission money could not be recovered. He contended the present contract was not against public policy.

The Chief Justice said that to deceive the public appeared to him to be against public policy.

Mr. Innes said the tendency of the law had been to restrict as much as possible the operation of this question of public policy, especially in so far as it involved the breach of contracts. He referred to Sir George Jessel's judgment in the *Printing and Registering Company v. Sampson* (19 Eq., 462), and to *Anson on Contracts* (p. 181).*

Mr. Justice Upington asked supposing instead of a child they had falsely represented a picture as by Sir Edward Landseer, and agreed to exhibit it, could they recover under the contract?

Mr. Innes said that was quite a different case, because it went to the root of the whole matter. The only thing that would induce people to see that picture was that it was by a celebrated artist. But this child was, as Mr. Harvey said, a natural phenomenon, whether ten or twenty. He could not defend the contract from a moral point of view, but it had been entered into, and the question was whether it was entered into to defraud the public, and had the public been defrauded. It was a legal and binding contract, and the defendant only broke it because it would not pay. There was nothing illegal or contrary to public policy in the contract.

Mr. Searle was heard for the defendant. He submitted that the plaintiff could not recover damages if he induced the defendant by fraud to enter into this contract; and secondly, he could not recover if his contract was such that the Court was satisfied that he was a party to a fraud on the public. He contended that the contract was entered into by fraudulent representations on the plaintiff's part.

The Chief Justice asked if the receipts for the last week had been £1,000, would the defendant have broken the contract.

Mr. Searle said that was an unfair way of putting it, for just before the rupture the receipts were better than previously.

* But see *Rust v. Marsh* (16 Ch. Div., 395).—Rep.

Mr. Justice Uppington : He himself said he gave up the contract because his reputation was worth any amount of money, but I have my doubts about it.

Mr. Searle said defendant had a very high reputation in the Colony, and was well known and well received in South Africa. In further argument, he contended that it was no answer for a person deceiving to say that the truth could be found out if proper and sufficient inquiries were made.

Mr. Innes replied.

The Chief Justice in delivering judgment said : It is clear from the evidence that ever since the plaintiff has had the possession of the child, whom he calls Princess Topaze, the great attraction which he held out to the public of the different countries where he exhibited her has been her diminutive stature at the age of fifteen and sixteen. Her age was placed in the forefront of every advertisement published with the full cognizance of the plaintiff. In his so-called biography of the child which he has sown broadcast, and which he says has a circulation of eighty thousand copies a year, her age, verified it is said by a birth certificate, is mentioned as a conspicuous feature of the show. All the accessories of the show, such as the small barouche and pair of diminutive ponies, are so arranged as to make the little child appear to be a "lady," as she is called in all the advertisements. In fact she was only eight when first exhibited, and now she is ten instead of sixteen as alleged in the later advertisements. I entertain no doubt whatever that it was with a view to this deception being carried out in South Africa that the plaintiff entered into the contract with the defendant. During the fourteen weeks of the tour the defendant, with the full knowledge of the plaintiff, extensively advertised the child as the smallest "lady" in the world and as being only sixteen. Before the full period of the contract had expired the defendant put an end to it, and the first question to be determined is whether the plaintiff is entitled to damages for such breach. His case is that it is the custom in the showman's business to represent the so-called "Midgets" as being really older than they are, and that the defendant knew full well when he entered into the contract what the child's age was. A custom cannot be relied on in support of a deceit perpetrated upon the public, nor does the defendant's knowledge of the deceit assist the plaintiff's claim for damages. If both were equally guilty, then, according to the well-known rule of law (*Dig.*, 15, 17, 154), the plaintiff is not entitled to the assistance of the Court. The defendant, by his claim in reconvention, seeks to recover damages on the ground that he had been induced to enter into the contract by reason of the false representations of the plaintiff. I am by no means satisfied that the plaintiff ever made any

direct representations to the defendant as to the age of the child, but if the defendant could have proved that it was in consequence of the representations made in the biography, and in other ways, that the child was sixteen years old that he entered into the contract, the fact that the representations were not direct would not stand in his way. It is clear, however, that whoever may have been deceived the defendant never was misled. He had ample opportunities of verifying the age of the child at the date of the contract, but he simply closed his eyes to the facts of the case, and was indifferent as to the age of the child so long as he could make money by the show. He says that it was a condition of the contract that the certificate of age should be shewn to him, but he did not consider it necessary to insert this condition into the written contract. The plaintiff denied such a condition, and certainly if such a condition was considered material, the defendant could have known that the non-production of the certificate before the parties left England for the Cape would have justified him in refusing to carry out his contract. He says he had his suspicions all along, but in spite of those suspicions, we find him exhibiting this child as a most wonderful "phenomenon," the wonder consisting in her diminutive stature at sixteen years of age. It was only when the proceeds of the entertainments were diminishing week by week, and the time was drawing near for him to find the money to send the troupe back to England, that the defendant's suspicions took a practical shape. He then thought it convenient to put an end to the contract, and he now claims damages for the deception alleged to have been practised upon him. As I consider that the defendant was not deceived by the plaintiff's alleged false representations, I am clearly of opinion that the defendant ought not to succeed in his claim in reconvention.

Mr. Justice Buchanan concurred, and said it was clear from the evidence that the whole contract was founded on fraud.

Mr. Justice Uppington also concurred.

Judgment was accordingly given for the defendant on the claim in convention, and for St. Marc on the claim in reconvention. Each party was ordered to pay his own costs.

[Plaintiff's Attorney, G. Montgomery Walker ; Defendant's Attorneys, Messrs Fairbridge & Arderne.]

REGINA V. SUTTON. } 1893.
} Nov. 14th.

Liquor licence—Act 25 of 1891, section 26—
Bona-fide lunch or dinner—Sunday privileges.

The test to be applied whether food supplied with liquor on a Sunday constitutes a "bona-

side lunch or dinner," in terms of the 26th section of Act 25 of 1891, is whether the food was ordered and supplied merely as an excuse for the supply of the liquor, or with the bona-fide object of being taken as a fairly substantial meal, with the liquor as a mere accessory.

The holder of a liquor licence supplied two customers with beer on a Sunday evening at half-past eight, after they had bought a bit of biscuit and cheese, and the customers were found by the police standing and drinking the beer with no bread or cheese before them.

Held, on appeal, against a conviction of the licence holder, that the circumstances were such as to justify the Magistrate in deciding that the meal was neither a bona-fide lunch nor a bona-fide dinner.

Appeal from a sentence passed upon the appellant by the R.M. of Port Elizabeth.

The summons alleged that the accused did, on or about the 17th day of September, 1898, and at the Falcon Hotel, Port Elizabeth, wrongfully and unlawfully contravene paragraph 7, section 78, of the Act 26 of 1888, as amended by section 26 of the Act 25 of 1891, in that he did sell or supply a certain quantity of liquor to John Knox and Thomas Forster, the said John Knox and Thomas Forster not having been supplied with a *bona-fide* lunch or dinner.

The accused pleaded not guilty.

The following evidence was given:

Sergeant Wynne stated that on Sunday, 17th September, he accompanied Mr. Creed to the hotel kept by the accused, which was opposite to the police-station, entering it at a quarter before nine that evening. The front door was open, and the place lighted. He and Mr. Creed entered a room just off the bar. There were nine persons in the room all having refreshments. They were eating and drinking, with the exception of two, who were drinking only. Those two were Thomas Forster and John Knox. When witness entered the room these men were standing facing him, and each had a glass in his hand. The glasses were half filled with some bright and sparkling liquid, either ginger ale or beer. They emptied their glasses and put them down. Witness did not see either of them eat anything, nor was there any food before these two men. The other people were eating biscuit and cheese. There was no tablecloth laid. There was a bill of fare hung up, and accused said that any person could have anything that was on it. Forster and Knox said in the presence of the

accused that they did not live in the hotel. Forster said, "I have had my supper an hour ago, it consisted of biscuit and cheese."

Cross-examined: I stepped into the room and had a good look round. Neither Forster nor Knox had plates before them.

Thomas Forster, sworn, states: I am a clerk and live at Port Elizabeth. I know the accused and his hotel. On 17th September, 1898, a Sunday evening, about 8.30, I was standing at the opening in the wall where the liquor was served having a glass of beer, and a friend was with me named Knox; he also had a glass of beer, English draught ale. While we were drinking this glass of ale Mr. Creed and the last witness came into the room. The barman of the hotel, who is now in court, served us with the ale, and Knox paid for it. I had some biscuit and cheese four or five minutes before that. We were shown the bill of fare, and Knox and I ordered a biscuit and cheese, and a glass of beer. I had tea at my own house between five and six p.m. I had had a glass of beer before that, also with biscuit and cheese. A man in the room was eating cold meat. The others were having biscuit and cheese and beer and other liquors. I was not living at the hotel.

Cross-examined: J. could have ordered anything on the bill of fare. Mr. Knox did not live in the hotel.

Knox stated in his evidence *inter alia* that on the evening in question he was waiting for the mail and invited Forster to go over with him to the Falcon and have a glass of beer. That his attention was drawn to the bill of fare, and that the accused said, "It is necessary for you to have something to eat if you want something to drink." Witness then ordered biscuit and cheese and two long glasses of beer, and paid 1s. 6d.

Cross-examined: I consider that what I had was a *bona-fide* meal. I can get nothing at home after 5.30 p.m. on Sunday. I could have had anything on the bill of fare.

The accused was found guilty and sentenced to pay a fine of £3.

The following were the Magistrate's reasons:

The provisions of the licence allow the accused to sell liquors in reasonable quantities to those who take and pay for a *bona-fide* luncheon or dinner.

It is contended for the defence that 8d. worth of bread and cheese is a *bona-fide* luncheon or dinner.

Now, with regard to the word luncheon, its signification is a meal at noon or thereabouts, and the alleged contravention of the law having taken place at 8.30 p.m., it is, I think, plain that the "meal," call it supper or what you please, was certainly not a luncheon.

Then the only alternative was "dinner." Can it be said that a few pieces of bread or biscuit and cheese constitute a *bona-fide* dinner?

Although the term *bona-fide* dinner is somewhat vague it is not elastic, and I conclude that by selling a piece of biscuit and cheese only with liquors the accused contravened the law.

I have consulted several dictionaries for the derivation of the word luncheon, and find that the majority decide that the word is synonymous with *nuncheon* or *noonshun*, a meal taken between breakfast and dinner during the heat of midday, when the labourers or harvesters retired to the shade to shun the noon.

Many old English writers are quoted, among them Butler's *Hudibras*, "They laid aside their swords and truncheons and eat their breakfasts or their *nuncheons*." *Luncheon* or *nuncheon* is said by all to be a noonday meal.

From this judgment the accused now appealed. Mr. Searle was heard in support of the appeal. He said that section 89 was the proper section under which to bring the prosecution.

The Chief Justice: That was not the ground of appeal stated in the notice. The ground was that the meal supplied constituted a *bona-fide* lunch or dinner.

Mr. Searle said the point in the appeal was as to the construction of the section. There was no decision of a Superior Court upon its construction, though there had been more than one decision in the Magistrates' Courts here and in Kimberley, and the Magistrates had adopted very different readings of the clause, one holding that a *bona-fide* meal could not consist of bread and cheese, and another considering that it could.

Mr. Justice Buchanan: Isn't it a question of fact? Can you define a *bona-fide* meal?

Mr. Searle: There must be some principle on which one must go. They must take one of two grounds, either the amount consumed—which was a very crude way of dealing with it—or they should consider what was the object of the meal. It might be said that the amount consumed was so small that it could not be considered a meal, and that the men only wanted a drink.

The Chief Justice: Isn't that the test? Is it *bona-fide* or is it merely an excuse for getting drink?

Mr. Searle thought that a somewhat difficult test to apply in all instances, because in many cases a man's cravings with regard to hunger and thirst came at the same time, and very naturally a man drank when he was eating. The Act contemplated that when liquor was drunk a reasonable quantity of food was also to be consumed. It could not be said because a man took a very small quantity of food

that he was not acting *bona-fide*. Nor was there anything in the time at which it was consumed. People took meals at all sorts of times. People had been known to take breakfast in the afternoon.

Mr. Justice Buchanan: Their occupation might oblige them to do so.

Mr. Searle said he had known people who took nothing till the afternoon; the time for dinner varied very considerably. Early in the century it was four o'clock, now it was eight, and with some it was the middle of the day. The Magistrate seemed to consider that because it was taken at 8.30 it could not be a luncheon; it must be a dinner.

The Chief Justice: One of these men had already had tea.

Mr. Justice Buchanan: It would have been better if the Legislature had defined what was meant by a *bona-fide* luncheon.

Mr. Searle: It was a very unsatisfactory state of the law. This section was so ambiguous that it seemed a hardship when persons were brought up under it. The appellant had a respectable house, and made no secret that he had these men on the premises. Cold viands of a light description were laid out, one man was eating cold meat, and the rest apparently were content with biscuits and cheese. It was by no means clear that all these people were attracted by the drink. There was a bill of fare, and if any wanted a substantial meal they could have it. It was not done to bring people in to drink, with the general noise and disturbance that accompanies drinking at the bar of a public-house. These people were waiting for the mail steamer, and one suggested that they should have something to drink and eat. The magistrate would have to dive into a man's mind to see whether the desire for eating or for drinking worked more strongly in him, and to find out whether he ate that he might drink or drank that he might eat, or whether he was both hungry and thirsty. These people did not intend, nor did Mr. Sutton, to evade the law. What seemed to press upon Mr. Creed, who prosecuted, was that they had no biscuits and cheese before them, and that all the other people had. But they had finished eating before the police came in. If the prosecution was not brought for this reason, why was not the accused summoned for selling to the other people also? The Magistrate found, as a fact, that they had eaten the bread and cheese.

The Chief Justice: The charge was probably brought with reference to these two because the prosecution wished to take the strongest case.

Mr. Searle: It could never be argued that because they had finished the biscuits and cheese before the drink, the hotel-keeper should be

prosecuted. It was a very important matter, both for the public and for persons supplying intoxicating liquors, that the law should be clear. At Kimberley the Magistrate held that biscuits and cheese were sufficient.

Mr. Justice Buchanan: It was a matter for the Magistrate to decide, if he considered it *bona fide*. Two different juries might arrive at different conclusions on the matter.

Mr. Searle: It that were so it was a most lamentable state of the law, because the Legislature must have intended that some principle should guide the Court, otherwise the whole public would be in the greatest state of uncertainty, and people keeping hotels would not know what to do.

Mr. Giddy was not called upon for the Crown.

The Court upheld the conviction.

The Chief Justice said: It is very much to be regretted that the Legislature did not define the terms "*bona-fide* lunch or dinner." In the absence of such a definition, the Court before which the holder of the licence is prosecuted must be guided by all the circumstances, under which the meal was supplied and the liquor sold, in deciding whether or not such a meal falls under the denomination of a "*bona-fide* lunch or dinner." If we were to lay down, as contended by Mr. Searle, that so long as food of whatever description is supplied with the liquor the Act is complied with, the section would be reduced to an utter absurdity. We must therefore give a reasonable interpretation to the section, such an interpretation in fact as we may fairly consider the Legislature to have had in contemplation. The test I would apply is this, was the food ordered and supplied merely as an excuse for the supply of the liquor, or was it ordered with the *bona fide* object of being taken as a fairly substantial meal with the liquor as a mere accessory. It is only by applying a test of that nature that effect can be given to the term *bona fide* which we must assume the Legislature to have inserted with a definite object. Whatever may be the etymology of the term "lunch" I take its ordinary modern meaning to be a light meal taken about midday as distinguished from a heavy meal taken about or towards evening, either of which would be better known as a "dinner." The meal in question consisted of a bit of biscuit and cheese taken standing at half-past eight at night. When the police came on the premises no bread or cheese was before the two customers and they were found drinking beer. Under such circumstances no fault can be found with the Magistrate's finding that the meal was neither a *bona-fide* lunch nor a *bona-fide* dinner, and that the cheese and bread, if served at all, were served as an excuse for the sale of the beer on a Sunday.

The appeal must therefore be dismissed.

Mr. Justice Buchanan concurred. He said the Magistrate exercised his discretion in deciding a question of fact, and the evidence supported his decision.

Mr. Justice Upington also concurred. It seemed clear to him that the biscuits and cheese were only obtained with a view to procuring the liquor.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.

PROVISIONAL ROLL.

MARSH V. VAN DER SPUY. { 1898.
Nov. 16th.

Mr. Shippard moved for provisional sentence on a mortgage bond for £450, with interest at 6 per cent. from the 16th of January, 1898; also that the property be declared executable.

Granted.

WALSH BROS. V. D OLIVIERA.

Mr. Watermeyer moved for provisional sentence for £18 4s. 1d., balance of an account for goods sold and delivered.

Granted.

Ex parte BATE.

George Frederick Bate was admitted as attorney and notary on the application of Mr. Webber, the oath to be taken before the Resident Magistrate at Queen's Town.

REHABILITATION.

The following rehabilitation was granted on the motion of Mr. Buchanan: Charles Mathews.

GENERAL MOTIONS.

TYFIELD V. TYFIELD. { 1898.
Nov. 16th.

Marriage out of community—Adultery—
Action for divorce—Funds to prosecute
same.

The Court ordered a husband married out of community, who had been separated from his wife, and who was alleged to have com-

mitted adultery (which was not denied) subsequent to the separation, to pay £20 to his wife, who had barely sufficient means to support herself and her children, to enable her to institute an action for divorce.

This was an application on notice calling upon the respondent, Jacob Tyfield, of Cape Town, to show cause why he should not be ordered to pay the applicant the sum of £20 to enable his wife to institute proceedings against him for divorce on the grounds of adultery, and why he should not pay the costs of this application.

The applicant alleged in her affidavit that she was married to the respondent in Australia on the 18th June, 1877.

That there were three children, issue of the marriage, still living.

That she was desirous of instituting an action against the respondent for divorce on the grounds of his adultery with one Mary May.

That the respondent carries on a large clothing business in Cape Town, and was well able to put the deponent in funds to prosecute her action for divorce.

That she had no means wherewith to institute proceedings against the respondent, to whom she had applied through her attorney for the sum of £20, but had received no reply.

Mr. Sheil was heard in support of the application.

The respondent appeared in person, and stated that three years ago he brought an action against his wife for restitution of conjugal rights, and tried to get a divorce. He spent all his money, and failed to get a decree. Mrs. Tyfield was in a better position than he was himself. He had tried to obtain the custody of the children, but without success.

The Chief Justice: Are you married in community of property.

Respondent: No. The former trial had cost him £180.

Mr. Sheil said that in 1890 the respondent sued his wife for restitution of conjugal rights, failing which for divorce. She defended the action, and obtained a decree of judicial separation on the ground of his cruelty. The Court ordered him to pay £100 for the maintenance of the four children, which was not sufficient to maintain them for three years. The respondent had not denied the adultery. In fact he was living in open adultery.

The respondent said that his wife had stated in court that she could save £10 a month from her business.

Mr. Sheil: Mrs. Tyfield is in court, and will answer any questions on the subject.

Mr. Justice Upington: On this separation taking place, did not Tyfield cease to be responsible for the debts of his wife in every way?

Mr. Sheil: Possibly for her debts. He was still, however, liable to maintain his children.

Mr. Justice Upington: What are the costs in this action but debts?

Mr. Sheil: The marriage took place in Australia, where the common law of England prevails. Under English law, unless the wife had sufficient separate estate, the husband was obliged to provide her with funds to prosecute her action (*Bright on Husband and Wife*, vol. ii, p. 8, and *Ex parte Moore*, 1 De Gex., 178).

Mrs. Esther Tyfield was then sworn, at the request of the Court, and stated that she was carrying on a small grocer's business. She had to support her children. Four years ago she got £100 and nothing since. She owed more than her assets would realise. She did not know what her husband's business was.

Respondent, in reply to the Chief Justice, declined to say whether he would deny the adultery and defend the action.

The Chief Justice: I think there is fairly satisfactory evidence that this woman will have difficulty in finding the money to pay the costs. The Court will, therefore, award a reasonable sum for the purpose of enabling her to prosecute the action. There is no serious denial of the adultery. The defendant refuses to say anything with reference to it. The Court will award the sum of £20.

[Applicant's Attorney, J. C. de Korte.]

SHARPE'S EXECUTORS V. VAN DER BYL { 1893.
 { Nov. 16th.

Mr. Molteno applied for the attachment, *ad fundandam jurisdictionem* of this Court, of certain landed property, fully described in the bond mortgaging the same, in proceedings about to be instituted by the applicants for the recovery of the amount of the said bond.

An order was granted for the attachment *ad fundandam jurisdictionem* with leave to sue by edictal citation, returnable on 13th December, personal service to be effected if possible.

ESTATE OF THE LATE HESTER A. C. M.
MARINCOWITZ.

Mr. Buchanan moved for leave to the executors testamentary to raise a sum of money on mortgage of the farm Vrolykheid and adjoining ground in the district of Prince Albert, the property of the estate, for the purpose of paying the debts thereof.

An order was granted in terms of the Master's report.

Ex parte DENEKE } 1898.
Re THE MINOR CLAKE. } Nov. 16th.

Minor—Desertion by father—Appointment of tutor dative.

Where it appeared that a minor, who was entitled to certain property under the wills of his mother and his step-sister, had been deserted by his father, the Court authorised the Master to appoint a tutor dative to the minor.

The minor's mother died on 16th March, 1890.

Previous to her death the minor's father, George Clarke, left the Colony for Johannesburg.

Under his mother's will certain movable property and one-third share in the Commercial Hotel, Adelaide, were bequeathed to the minor, and one Alexander Christie Millar was appointed his guardian or tutor testamentary.

Letters of confirmation as such guardian or tutor testamentary were duly issued to Millar by the Master.

On 12th April, 1892, Millar was relieved of his office.

In the early part of the present year the petitioner alleged that he instituted inquiries in Johannesburg for the minor's father and was informed that he had left that town, but he could not ascertain his whereabouts; and that it therefore appeared that the minor had been deserted and that his estate was unrepresented.

On 11th April, 1898, the minor's step-sister died, leaving a will under which he was appointed heir of one-third of her estate and effects.

The petitioner alleged that since April last he had been maintaining and educating the minor, that he was a step-cousin of his, and was willing to undertake the office of guardian or tutor dative of the minor.

The prayer was that the Court might appoint the petitioner guardian or tutor dative of the minor, or might direct the Master to publish an edict calling a meeting of paternal and maternal relations of the minor to see some fit and proper person selected for the Master's approval appointed guardian or tutor dative.

Mr. Shippard was heard in support of the application.

The Court authorised the Master to appoint a tutor dative to the minor.

[Petitioner's Attorney, Gus. Trollip.]

In re MCCALGAN. } 1898.
 } Nov. 16th.

Wills Ordinance—Privileged will—Attestation.

A document by which a father divides his property among his children upon his death

is not a privileged testament so as to be exempt from the requirements of the Wills Ordinance, unless it is written by himself.

This was the petition of the widow and children of the late Charles McCalgan.

On or about the 19th September, 1898, shortly before his death, the deceased and his wife executed what he intended to be a mutual last will and testament, whereby he authorised the first-named petitioner to remain in possession of his estate until her re-marriage, death, or other specified eventuality, and fixed the shares and proportions to which his children were to succeed as his heirs.

The will was written on two leaves of paper, to the second of which only the testator made his mark, which was duly witnessed by two witnesses.

The Master refused to recognise the instrument as a will, inasmuch as the Wills Ordinance had not been complied with, and declined to issue letters of administration to the persons named therein as executors.

The petitioners alleged that they being the only persons intended to be benefited by the said disposition, and also those entitled to succeed *ab intestato*, had agreed amongst themselves as to the desirability of adhering to their father's wishes.

The prayer was that the document should be recognised as a privileged will, and that the Master should be authorised to issue letters of administration to the persons named as executors.

Mr. Shippard, for the petitioners:

This, being the will of a father disposing of property among all his children, is to be considered a privileged testament: See—*Steer's Executor vs. The Master* (5 Juta, 318); *Executors of Eaton vs. Eaton* (Buch. 1876, p. 178); *Ex parte De Wet* (Buch. 1876, p. 119).

There the Court was dealing with holograph wills; but a will merely signed by a testator is equally privileged: See *Grotius' Introduction*, 2, 17, 23; *Van Leeuwen's Comm.*, 3, 2, 13; *Censura Forensis*, p. 1, b. 3, 2, 19; *Voet*, 28, 1, 15; *Perezius in Codicem*, 3, 36, 16; *Gaill* 2, obs. 112, 8.

Does such a will require witnesses?

Voet, 28, 1, 15, requires two witnesses. So does *Cujacius* (*Van Leeuwen's Cor Jur Civ. C.* 3, 86, 26, note 64), on the ground that their presence is essential to the validity of wills, and is not a matter of form.

On the other hand, *Gothofredus* seems to regard their presence as unnecessary, on the ground that all formalities may be dispensed with, and that this is one of those formalities (same note).

Perezius (in *Cod. 6*, 28, 26) says of *privileged wills* in general that some authorities seem to require two witnesses, while others would dispense with them.

(This Court has already followed the latter authorities in the cases cited.) *Grotius* and *Van Leeuwen* (*loc cit.*) do not require witnesses; and *Van der Keessel*, a later writer than *Voet*, does not add anything to the requirements set out by *Grotius*.

See also *Gaill. 2, obs. 112, sub sections 1, 2, 6—8, 14.*

The better opinion, then, seems to be that witnesses are not required. But if *Voet* is followed, yet the Ordinance does not apply, for section 3 must be taken to refer only to wills which under the common law were required to be *at tested* and *signed* by witnesses, and to prescribe a particular mode therefor. It does not extend the requirement to wills which had never hitherto required signatures.

Voet does not say that the witnesses must sign the document; and there is nothing in the context, or in the use of the word "*testes*" to lead us to believe that he meant this.

Again, the reason given by *Cujacius* for requiring witnesses clearly does not apply to signatures, which were a formal requisite of non-privileged wills introduced by Imperial constitution.

Perezius, moreover, expressly says that those authorities that require witnesses do not require the seals and signatures of those witnesses.

In the present case two witnesses can be produced who saw the testator sign this will.

This mode of proof being sufficient to satisfy the stricter authorities, this will is entitled to be declared privileged.

The Court refused the application.

The Chief Justice said: The Court is much indebted to Mr. Shippard for the industry with which he has collected the authorities bearing on this case. These authorities are certainly very conflicting. The opinion of *Voet* (28, 1, 15) is against the applicant's contention, but it must be admitted that the opinions of most of the other commentators are the other way. The differences between the commentators have mainly arisen out of an obscure passage in the *Novels*, to which conflicting interpretations have been given. It is unnecessary, in view of our own Wills Ordinance and the actual practice of this Court, to inquire into the correct interpretation of the passage. In *Tennant's Notary's Manual* (ch. 8, sec. 2) wills made by parents disposing of their property among their children are stated to be privileged, but only in case the names of the children are written by the parents in their own hand. *Eaton's Case* (Bush. (1875) p. 178) was the first to recognise such documents as wills although not executed in conformity with the requirements of the Wills Ordinance, and that decision proceeded on the ground that the will had been written by the testator's own hand. In *De Wel's Case* (Bush 1875,

p. 119) and *Steer's Case* (5 Juta 313) the wills were written by the respective testators themselves. We are now asked to extend the privilege to a will said to have been written by the direction of the testator, but admitted not to have been written by himself. If such a will would, if executed before 1st January, 1844, have been valid although not attested at all, it must now be recognised as valid, but if before that date it would have required to be attested by some number of competent witnesses, then the execution ought to have been in terms of the Ordinance.

According to *Voet*, if the father's will distributing his property among his children was not written by himself but by another by his direction it required to be attested by two witnesses. As this view is supported by the Colonial authorities, and is, in my opinion, consistent with the policy of our law, I prefer to adopt it, even although there may be some doubt as to the correctness of his interpretation of certain passages in the *Code* and *Novels*. The application must therefore be refused, but the costs must come out of the estate as the question was a fair one to be raised.

Their lordships concurred.

[Petitioner's Attorneys, Messrs Van Zyl & Buissinne.]

In re WATSON. { 1893.
Nov. 16th.

Will — Attestation — Executors — Act 22 of 1876.

The appointment under a will, attested by three or more competent witnesses, of one of such witnesses as executor, is null and void under Act 22 of 1876.

This was the petition of Joseph Henry Watson, a son of the late Joseph Watson, of Driefontein, in the division of Somerset East, who died on the 26th June last.

Under the last will and testament of the petitioner's father the petitioner and his brother, Thomas James Watson, were appointed executors and guardians of the minor children. In June last the testator was taken seriously ill, and while on his way to Port Elizabeth to consult a medical practitioner died on the Zuurberg Pass.

A few days before the testator's death, after his medical adviser, Dr. Considine, of Port Elizabeth, had despaired of his recovery, the petitioner asked to see his father's will. The will was produced and the petitioner found that it had been attested by two of the testator's heirs (Louis and James Watson), who were at the time of their attestation both minors.

The petitioner finding that the will was improperly attested, there and then informed the

testator thereof, and he asked the petitioner to do what was necessary to its validity, whereupon the petitioner asked Dr. Considine and a Mr. Izak Zirk Keovy, who happened to be present at the time, to attest the will.

Dr. Considine and Keovy, in the presence of the testator, who was in full possession of his mental faculties, and in the presence of each other, all being present at the same time, attested the will, after the testator declared it to be his signature which was affixed to the document and that the document was his will.

The petitioner alleged that finding that the will had been improperly executed, in his anxiety for the heirs, and without thinking what he did, signed his name as well as the witnesses, and indeed signed before Dr. Considine and Mr. Keovy, in the order of time. After the death of their father petitioner and his brother, Thomas Watson, who was appointed co-executor with the petitioner, applied to the Master for letters of administration.

The Master issued letters to Thomas Watson, but refused to grant them to the petitioner, on the grounds that he had witnessed the execution of the will. The petitioner alleged that he felt aggrieved by this decision of the Master, and prayed that an order might be granted authorising the Master to issue letters of administration to him as co-executor under his father's will.

Dr. Considine and Mr. Keovy filed affidavits deposing to the correctness of the facts attending their attestation as deposed to by the petitioner.

Mr. Webber was heard in support of the application, and referred to Act 22 of 1876, section 4, and to *Van Leeuwen (Cen. For. 3, 2, 6)*.

On the question of the application standing over for the production of evidence to show that the petitioner had not signed as a witness, he cited *Murphy's Case* (8 I.R. Eq., 300) and *Sharman's Case* (1 L.R., P. and M., 661).

The Master having read some correspondence, from which it appeared that the petitioner had signed the will as a witness, the Court refused the application.

The Chief Justice said: The only question is did the applicant attest the execution of the will, for if he did, his appointment thereunder as executor is null and void. If he was competent to attest the will he must be held to have so attested it even although it was attested by two other competent witnesses. It might have been different if he had been incompetent to attest the will, but there is no allegation that he was. Having attested the will his appointment as executor is void, and the application to compel the Master to grant him letters of administration must be refused, but the costs may fairly be paid by the estate.

HHH

Their lordships concurred.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinne]

OLASSEN V. LHEM. { 1898.
Re GRUNDLING'S WILL. { Nov. 16th.

Interdict—Will—Executors testamentary—
Undue influence.

The Court granted an interdict restraining executors testamentary from selling landed property, which the testator had directed should be sold six weeks after his funeral, it being alleged on affidavit that the executors testamentary had procured the execution of the will by fraud and undue influence at a time when the testator was non compos mentis.

This was an application on notice calling upon the respondents, the executors testamentary of the late Cornelius Grundling, to shew cause why an order should not be granted restraining the sale of certain landed property specified in a bill of sale annexed to the applicant's affidavit.

The applicant alleged that he was married in community of property to his wife, a daughter of the late Cornelius Grundling, who executed a will, copy of which was annexed.

That Grundling died on 27th September, 1898, leaving three children by his wife who had predeceased him.

That the applicant's wife, Grundling's eldest daughter, had been excluded from her father's will.

That the estate was worth £8,000 and that the applicant intended forthwith to institute an action to set aside the will as being null and void on the following grounds:

1. That before and at the date of the execution of the will the testator was *non compos mentis*.

2. That the will was improperly executed, and that both the witnesses were not present at the execution as required by law.

3. That the exclusion of applicant's wife was procured by means of the grossest fraud and undue influence exercised by the respondents (who were the principal beneficiaries under the will) over the testator.

Applicant annexed a bill of sale showing that an auctioneer had been authorized to sell part of the landed property.

The prayer was for an order restraining the respondents and the auctioneer from selling the land pending an action to be brought to have the will declared null and void.

The testator in his will directed that all the land not specially bequeathed should be sold by his executors within six weeks after his funeral.

The Chief Justice: Supposing the applicant fails to prove that the will is bad we shall be running counter to the testator's wishes that the estate should be sold within a short specified time of his funeral.

Mr. Molteno: That risk has always to be run in contesting a will. The other side has made no appearance.

The Chief Justice: Will your client undertake to be responsible for all loss to the estate in consequence of the postponement of the sale?

Mr. Molteno said if there were any loss he took it they would be responsible.

The Chief Justice: The respondents have not appeared, although due notice has been given and there has been ample time for such appearance. In its absence, therefore, the Court will grant an interdict preventing this sale pending the result of an action to be forthwith brought to test the validity of the will. Costs will be costs in the cause.

[Applicant's Attorneys, Messrs. Fairbridge & Arderne.]

ROWE V. ROWE. { 1898.
{ Nov. 16th.

Mr. Joubert applied for an order requiring respondent to pay to applicant, his wife, the sum of £60 to enable her to institute proceedings against him for divorce, by reason of his alleged adultery, and also a further sum by way of alimony, for her maintenance pending the result of such suit.

The applicant alleged that she and the respondent were married in community of property, that she was anxious to institute an action for divorce on the grounds of her husband's adultery, that she was without means, and that he was worth at least £800 a year.

The Chief Justice: As the action will be tried at once there is no necessity for prejudging the case by doing any more than granting an order for the payment of a sum of £30.

BLACKBURN V. STEWART.

Mr. Searle moved for leave to substitute the name of the trustee of the defendant's insolvent estate on the record as the legal representative of the defendant, and further for authority to use at the trial of the said suit certain affidavits sworn to in London on the 16th October last by the secretary of the Transvaal Gold Exploration and Land Company.

The order was granted.

MAKALELA V. MAKALELA.

Mr. Tredgold moved for leave to sue *in forma pauperis* in an action against petitioner's husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

The Chief Justice: Is this a Kafir lady?

Mr. Tredgold: I judge so from the name, but I do not know. They are Willowmore people.

Referred to counsel.

LEEN V. LEEN. { 1898.
{ Nov. 16th.

This was an action by the wife for restitution of conjugal rights, failing which for divorce, by reason of her husband's malicious desertion.

Mr. Oastens appeared for the plaintiff; the defendant was in default.

Georgina Leen, the plaintiff, deposed that she was married to the defendant at the German Mission-Station, Omaruru, Damaraland, on the 26th of February, 1878.

The Chief Justice asked what law did they administer there.

Mr. Oastens said he presumed it was the Colonial law.

Mr. Justice Upington: This is in the German Protectorate, and has never been a portion of the Colony at all.

Mr. Oastens: Then I suppose it is German law.

The plaintiff said there was no German Protectorate when they were married. They came down to the Colony on account of the war breaking out. Her husband went back to Damaraland to trade about ten years ago, and had not come back. She had written to him on several occasions, but had only received three letters from him, written shortly after he left. He never said anything about coming back, and never requested her to go to him.

By the Chief Justice: She never offered to go back to him.

In further examination, the plaintiff said that in 1892 he was at the Dooks for half an hour. He did not then ask her to go back. He sent her only £5 for her support since he left. She had one child, a boy of fourteen. Her mother supported her most of the time, and on her death, two years ago, she obtained a livelihood by keeping boarders.

The Chief Justice: Take a decree for restitution of conjugal rights, the defendant to return to or receive the plaintiff on or before the 12th of January, 1894, failing which, we shall grant a rule nisi calling on him to show cause on the 1st of February why a decree for divorce should not be granted and the plaintiff declared entitled to the custody of the child of the marriage, and why the

defendant should not pay the costs of this action, the rule to be served in the same way as the interdict.

[Plaintiff's Attorneys, Messrs. Findlay & Tait.]

CAPE OF GOOD HOPE BANK V. MELLE. { 1898.
Nov. 17th
and 21st,
Dec. 5th.

Discharge of debt—*Lex loci contractus*—Insolvency—Rehabilitation—Pledge—Security—Trustee—Execution.

The debts of an insolvent, incurred prior to his insolvency, are not discharged until he has obtained his rehabilitation.

A debt discharged by the law of the country where it was made payable cannot be sued for in any other country provided that the discharge amounts to an extinguishment of the debt.

M., being resident in the Transvaal, pledged certain shares to C. in security of a debt incurred there and afterwards his estate was sequestrated as insolvent by the High Court of the Transvaal.

C. neither proved his debt nor realised his security.

M. without first obtaining his rehabilitation came to reside in this colony.

Held, in an action brought by C. against M. for the amount of the debt, that the Transvaal insolvency was not per se a bar to the action, but that, without the trustee's consent, no execution should issue against any effects in this colony which, by virtue of such insolvency, could be claimed by him.

Held, further, that the retention of the shares by C. did not amount to a waiver of his right to sue for the amount of the debt, but that the shares should not be declared executable without giving the trustee an opportunity of claiming delivery of the shares for realisation.

This was an action for £1,081 12s. 6d., instituted by the official liquidators of the Cape of Good Hope Bank against Dr. George James McCarthy Melle, of Robertson.

The declaration alleged that at the date of the stoppage of the bank in September, 1890, the defendant was indebted to the said bank in the sum of £961 14s. 2d., being the balance to the

debit of his account with the Johannesburg branch of the said bank, together with interest thereon.

As security for the payment of the said sum, the defendant had pledged with the said bank certain shares (of which a list was attached to the declaration).

That since the date of the stoppage of the bank, the plaintiffs had received certain dividends in respect of the said shares, and had applied the same towards the reduction of the defendant's indebtedness to the said bank.

That interest on the said indebtedness had accrued since the date of the stoppage, and the defendant was now indebted to the plaintiffs in the sum of £1,081 12s. 6d.

The plaintiffs alleged that they were willing, and hereby tendered to deliver back to the defendant the said shares upon payment by him of the amount of his indebtedness, that all things had happened, all conditions had been fulfilled, and all times had elapsed to entitle the plaintiffs to be paid the said sum, yet the defendant refused to pay any part thereof.

The plaintiffs claimed :

(a) An order compelling the defendant to pay to them the sum of £1,081 12s. 6d., they undertaking to deliver to him the shares aforesaid.

(b) Or an order empowering them to sell the said shares, and compelling the defendant to pay the aforesaid amount, less the net proceeds obtained from the said shares.

(c) Further relief with costs of suit.

The defendant in his plea said that on or about the 24th September, 1890, the Cape of Good Hope Bank, trading in the South African Republic, was placed under official liquidation by the High Court, Pretoria, and that at that date he was indebted to the said bank, trading as aforesaid, in the sum of £961 14s. 2d., against which he had deposited scrip as per list A annexed to the declaration. He said that in September, 1890, and prior thereto, he resided at Johannesburg, in the South African Republic, in which country he was domiciled, and practised the medical profession.

That during 1890, and prior thereto, and while domiciled as aforesaid, he entered into certain share transactions in the South African Republic, and dealt with the Johannesburg branch of the said bank, trading therein, in connection with the said share transactions.

On or about 19th February, 1891, whilst the defendant was domiciled as aforesaid, he surrendered his estate in the said Republic, and a trustee was elected and meetings duly held, no claim was proved upon his said estate by the plaintiffs, nor did they hand up the scrip above referred to for the benefit of the estate.

Thereafter, in or about June, 1891, the defendant came to Robertson, within this colony, where he

has since been practising his profession, all the assets defendant is now possessed of have been (he alleged) acquired within this colony by his own work and labour since that date, and he said that by reason of the facts above set forth the plaintiffs had no claim thereupon.

The defendant refused to accept the shares tendered, and said that the same belonged to his insolvent estate, and that the plaintiffs had no right to receive dividends, or to realize the same apart from his trustee.

He therefore prayed that the plaintiffs' claim might be dismissed with costs.

The replication was general, and on these pleadings issue was joined.

Mr. Rose-Innes, Q.C., and Mr. Shell appeared for the liquidators; and Mr. Searle and Mr. Benjamin for the defendant.

The facts being admitted no oral evidence was given by the plaintiffs.

Dr. George James McCarthy Mello, the defendant deposed in reply to Mr. Searle, that he went to the Transvaal in April, 1887, four months after his arrival from Scotland, where he had been studying for his profession. Before he came out he had made arrangements for practising in the Transvaal, and went there with the intention of settling down. He was married there in 1889. He practised in Johannesburg for the greater part of the time, and for a short period at Pretoria. He visited the Colony once for a fortnight in June, 1889, when he came to see his mother, who was very ill.

By Mr. Justice Upington: He was born in this colony.

In further examination witness stated that he surrendered his estate in February, 1891, and in June, 1891, he came to Robertson, where he was at present practising his profession. He had no landed property; his assets consisted of a cart, horse, furniture, and medicines, and these had been acquired by the practice of his profession since he came from the Transvaal. His surgical instruments and books were sold by the trustee, and bought back by one of his friends. The first claim made by the bank was several months after he came to Robertson. The bank was aware of his insolvency, and it was advertised in the "Star" that it was the principal creditor. He questioned the manager on that statement, as the trustee told him the bank had made no claim, and that was the case. This debt was in respect of share transactions, and was the real cause of his insolvency. He endeavoured to compromise the matter with the bank, but no compromise could be effected, whereupon he surrendered his estate. He had no transactions with the bank in the Colony.

By Mr. Innes: His estate, he believed, realized only £38 16s. 8d., sufficient to pay the costs of administration. No dividend was paid.

By Mr. Searle: He gave up a large amount of book debts, close on £5,000. They were debts due in Johannesburg, and were handed to a firm in Pretoria for collection.

This closed the evidence.

Mr. Rose-Innes, Q.C., for the plaintiffs: It is clear law that a debt contracted in a particular country and not limited to a particular place of payment may be enforced wherever the debtor or his property can be found (*Story*, section 329).

But any defence, which can be taken by the law of the place in which the debt was contracted or was to be performed, is held of equal validity in every Court in which the question may be litigated (*Story*, section 331; *III. Burge*, 874).

Foreign Courts however will not give effect to any defence arising in another country unless it is a defence which would extinguish the debt in that other country. For instance if the defence is merely one which would bar the remedy in the country in which it arises, then the Court in which the action is brought, if the same defence does not exist there, takes no notice of it.

Thus prescription, where it bars the action, but does not extinguish the debt, is not recognised as a defence in a foreign country (*Story*, sections 335, 338, 340; *III. Burge*, pp. 878; 9 *Voet*, 1, 8, 30).

The question to be decided in the present case is, does the sequestration of the defendant's estate in the Transvaal operate by the law of that country as a discharge from the debt or does it merely bar the remedy? See the judgment of Shippard J. in *Dicks v. Pote* (6 E.D.C., 74).

It has been held by the English Courts that according to Cape law an order of sequestration merely acts as a stay of proceedings against the insolvent, and not as a discharge of his liabilities (*Frith v. Wallaston*, 7 Erob. Reps., 191). In this colony it has been held in *Alexander & Co. v. Lioni* (Buch. 75, p. 79) and *Reynolds v. House & Early* (8 E.D.C., 304), that the mere fact of sequestration outside the Colony did not bar an action in our Courts.

The sequestration in the Transvaal is no defence to the present action.

Mr. Searle, for the defendant, relied mainly on *Quelin v. Moisson*—(1 Knapp's P.O.R. 265).

Mr. Rose-Innes, Q.C., in reply.

Curia ad. vult.

Postea (21st November).

The Court delivered judgment.

The Chief Justice said: The debt for which the defendant is sued was contracted by him in the South African Republic at a time when he was still domiciled there. As a security for the debt he pledged certain shares in joint-stock com-

panies to the Johannesburg branch of the Cape of Good Hope Bank, of which bank the plaintiffs are the official liquidators. His estate was subsequently sequestrated as insolvent in the Republic, but the plaintiffs did not prove the debt, nor did they deliver or even tender the shares to the trustees there appointed. The defendant has not been rehabilitated, but he has received permission to trade, and he now resides at Robertson in this colony, where he practises as medical doctor. The plaintiffs now seek to recover judgment in this Court for the amount of the debt, they undertaking either to deliver the shares to the defendant, or to sell the shares and credit the defendant with the proceeds. The plea raises two questions of some nicety and great importance, which deserve very careful consideration. The questions are, firstly, whether the Transvaal insolvency absolutely debars the plaintiffs from suing the defendant in this colony, and secondly, whether the fact that the plaintiffs have never delivered or even tendered the shares to the trustee in any way affects the plaintiffs' right to a judgment. If the debt had been made payable in this colony, there would have been no difficulty whatever in finding an answer to the first question. There is no principle of private international law which would enable a debtor, by means of the laws of his domicile, to defeat the rights of the creditor to relief in the courts of the country where he resides and the debt was made payable. Accordingly in *Alexander v. Lioni* (5 Buch., 79) this Court decided that the sequestration of the defendant Lioni's estate in Griqualand West, which had not then been annexed to this colony, but was subject to the same insolvency laws, was no answer to an action brought here for the amount of a debt incurred by Lioni in this colony before his insolvency. The distinguishing feature of the present case is that the debt was incurred and made payable in the Transvaal. That fact would not, if the defendant had remained solvent, have debarred the plaintiffs from suing him for the debt in this colony, at all events after he had fixed his domicile in this colony. But the Insolvent Law of the Transvaal, which is admitted to be the same as that of this colony prior to the promulgation of Act 88 of 1884, prescribes the remedies to be pursued by creditors who wish to share in the distribution of the insolvent's estate. That estate comprises not only all the insolvent's property in the Transvaal, but also, according to the view of this Court in *Hovoe's Case* (8 Juta, 20), the right to claim delivery of all his movable property situated outside that country. The plaintiff's right to share in the distribution can only be made available by proof of the debt in the Transvaal, which is the *locus concursus creditorum*. But the question now to be determined

is not whether the plaintiffs can share in the distribution of the assets of the Transvaal insolvent estate. It is obvious that, if judgment is here given against the defendant, it cannot operate upon property already vested in the Transvaal trustee. But there might have been property in this colony belonging to the defendant which is beyond the control of the trustee, and if there were no means of obtaining judgment here against the defendant, that property could not be made available for the payment of his debts incurred elsewhere except by sequestrating his estate afresh in this colony. It so happens that the defendant does not own land in this colony, but the question whether any action can be brought against him at all cannot be made to depend upon the result of an inquiry whether he owns assets to satisfy such judgment in whole or in part. In my opinion the action can be brought in the country where the debtor is domiciled, unless by the law of the country where the contract was to be performed it has also been discharged. The debt cannot be deemed to have been so discharged unless and until such law has completely extinguished it. If the law of the *locus contractus* still recognises the debt as subsisting, although it provides specific remedies as the only means of enforcing it, the debt cannot be considered to be extinct so as to be incapable of being enforced in the country of the debtor's domicile according to the law of the *forum* of that country. Does insolvency then discharge the insolvent's debts according to the laws of this colony or of the Transvaal? The *cessio bonorum* of the Dutch law certainly did not operate as such a discharge. Throughout the Insolvent Ordinance no provision can be found which confers that wide effect on the mere sequestration of an estate as insolvent. On the contrary, although it specifies certain remedies which can alone be used to enforce debts incurred before sequestration, it recognises those debts as being in force until rehabilitation. The 120th section enacts that every order of rehabilitation "shall have the effect to discharge the insolvent from all debts due by him at the time his estate was surrendered or adjudged to be sequestrated, and from all claims or demands proved or hereby made provable, or in any manner claimable against his estate. If, therefore, the defendant had been rehabilitated by the Transvaal High Court, he could not have been sued for the debt in the Courts of this colony, but it is a fair inference from the 120th section that until rehabilitation the sequestration was not intended to operate as an extinguishment of the insolvent's debts. This view was obviously entertained by the judges of the Court of Exchequer in the case of *Frick v. Wollaston* (7 Exch., 184), where the Ordinance was pleaded as a defence to an action brought in that Court upon a judgment

of this Court in respect of a debt incurred in this colony. "Whatever," said Parke, B., "affects the contract itself, may be made use of as an answer to an action on the contract. . . . The law of the Cape of Good Hope does not say that the debt itself shall be considered as satisfied, and therefore it does not take away the party's remedy on his judgment. Neither does the law say that the remedy which the creditor may have against his debtor upon the judgment by proceeding against the real or personal estate in a foreign country is gone." As to the real estate, I fully adopt the learned judge's remark, but as to the personal estate in a foreign country, although the Insolvent Ordinance says nothing specifically on the point, I adhere to the view already expressed that the Court ought in comity to recognise the claim of a trustee appointed in the country of the insolvent debtor's domicile to the control and administration of his movable property here situate. The case involved the interpretation of the very Ordinance which is in force in the Transvaal, and is therefore more relevant to the present inquiry than the other cases cited, in which the effect of the insolvency laws of other countries had to be determined. In the case of *Oelwin v. Forbes* (Henry on Foreign Law, page 89), a question arose in Demerara, where the Dutch law prevails, whether it was competent for the Court to entertain a suit on a debt payable in England against a debtor against whom a Commission of Bankruptcy had issued in England. The question was answered in the negative and the judgment was confirmed by the Privy Council, but the case is important only on account of the great erudition displayed in the judgment of the presiding judge (Henry). The debtor had obtained his certificate of discharge in England under the laws then in force, and the certificate was held to be operative in Demerara. The decision of the Privy Council in the case of *Quelin v. Moisson* (1 Knapp's Report, 260), is more in point, but it depended entirely on the effect of the French law *de la faillite* upon debts owing by bankrupts in France. The report of the case is so meagre, that it is impossible to deduce any general rule from it. The debt sued for in the Royal Court of Jersey had been incurred by the defendant in France and made payable there. He became insolvent and absconded to Jersey, but it does not appear that he exchanged his French domicile for a domicile in Jersey. It was ascertained by the Privy Council that according to the law of France the debtor could not be sued, after his bankruptcy, in the French Courts, whereupon the judgment of the Jersey Court in favour of the plaintiff was reversed. If it were clear that according to French law the bankruptcy of the defendant did not extinguish the debt the case would certainly be a

weighty, although not conclusive, authority in favour of the present defendant, but the report does not make this quite clear. It was not an appeal from a colony where the Roman-Dutch law is in force, and can only be used, as any other English case may be used, to assist the Court in deciding some point upon which our own laws are silent. Certainly, none of the English cases which have been cited conflict with the views which I have already expressed in regard to our law. As to the first question therefore, I am of opinion that the plaintiffs are not debarred by the Transvaal insolvency from suing the defendant in this colony, with this limitation, however, that execution should not, without the trustee's consent, issue against any effects in this colony which, by virtue of such insolvency, could be claimed by him. In regard to the second question, it is important to bear in mind what the exact nature of a pledge is by our law. It confers no right of ownership on the pledgee, but only what is termed a *jus in re aliena*, the ownership still remaining with the pledgor. After the insolvency of the pledgor, his rights of ownership are transferred to the trustee of his estate. In some respects, however, the rights of the trustee are even greater than those of the pledgor. As a consequence of the care with which our law guards the pledgor against any abuse of the pledgee's rights, the latter is not, as a general principle, allowed to sell the thing pledged without the authority of a Court of Justice if the debtor objects (*Voet*, 20, 5, 6), and where the debtor had made a *cessio bonorum*, the Dutch law did not permit any secured creditor to sell the things pledged, but conferred the right to possess and sell them on the *curator bonis* appointed to administer the estate. (*Voet*, 42, 7, 7, and *Voet*, 42, 8, 8). The 98th section of the Insolvent Ordinance enjoins the trustees, subject to the directions of the creditors, forthwith to make sale of all the property belonging to the estate, and the 56th section makes it incompetent for such creditors to direct the trustees to do anything calculated to interfere with or injure the just rights of any creditor holding a preferable security. Whatever those just rights may be, the Ordinance nowhere confers on such creditor the power of himself realising the security. The 80th section, which provides for the proof of debts by secured creditors, is somewhat obscure as to the powers of the trustee, but reading that section with the aid of the 98th, and by the further light afforded by the common law, this Court decided in *Osmond's Trustees v. Hofmeyr* (4 Juta, 48) that, where the secured creditor has proved his debt and valued the security, the trustees are entitled to realise the thing pledged as part of the assets and for that purpose to claim it from the pledgee. Of course, if

the trustees do not pay the value estimated by the pledgee out of the first assets of the estate, they must as far as possible be guided in the mode and time of realisation by the wishes of the secured creditor. They must "reserve the full effect of the security to the creditor himself," but they are not enjoined to leave the security in the possession of the creditor who has proved his debt, nor are they relieved from the duty imposed upon them by the 98th section, to make sale of "all the property belonging to the estate." In the present case the plaintiffs have not proved their debt, and they have retained the pledged shares in their own possession. Does such retention debar them from the right which they would otherwise have to a judgment of this Court for the amount of the debt? As between the plaintiffs and the defendant the retention of the shares cannot have that effect, because there has been no waiver of the right to sue and the plaintiffs offer to re-deliver the shares to the defendant, or to sell them and credit the defendant with the proceeds. A re-delivery or sale of shares in the same companies and of the same number as those pledged would be a sufficient performance of the offer. At the same time, as the pleadings stand, a final judgment could not be given without giving the trustee an opportunity of claiming a delivery of the shares for realisation. The Court will grant a rule nisi calling upon the trustee, if so advised, to show cause on the last day of term why judgment should not be given against the defendant in the following terms: Judgment for the plaintiffs for the sum of £1,081 12s. 6d. with costs, on condition that execution shall not issue against any assets in this colony, which by virtue of the Transvaal insolvency claimable by the said trustee, save and except the shares enumerated in the schedule to the declaration, which are hereby declared to be executable; the trustee not to appear unless he objects to this judgment, and, in case of his non-appearance the additional costs incurred by reason of this rule to be payable by the plaintiffs and not by the trustee. Personal service to be effected on him.*

Mr. Justice Buchanan, in concurring, said he should like to remark with reference to *Quelin's* case, upon which so much reliance was placed for the defendant, that some explanation could be given if all the facts were ascertained. He noticed in the questions put by the English Courts to the French lawyers a point was raised as to the effect of the protection order obtained by the insolvent. In that case there was not only a sequestration order, but a protection order, or *sauf conduit* as it was called. It might be that under the French

law that protection order, coupled with the sequestration, might have the effect of reconciling the case with the others decided by the Privy Council. As to the construction of the 30th section, it was now too late for an individual judge to go behind the decision of the Supreme Court. He would not therefore commit himself to any construction of the 30th section beyond that laid down in *Osmond's* case. A good deal might be said in other cases not necessarily governed by the decision in *Osmond's* case, though he held himself bound by that decision.

Mr. Justice Upington also concurred.

[Plaintiffs' Attorneys, Messrs. F. & H. Reid & Nephew; Defendant's Attorneys, Messrs. Van Zyl & Buissinne.]

SHAW V. STEYN.

{ 1898.
Nov. 17th.

Vindicatio—Property sold in an insolvent estate — Evidence — Questions of fact—Appeal.

Held, on appeal from a Magistrate's Court that there is no rule of law which binds the Supreme Court to accept a Magistrate's decision upon a question of fact.

Where therefore a defendant had bought a horse in the insolvent estate of the plaintiff's father, and the plaintiff subsequently claimed the horse as being his property, and sued the defendant for its delivery or for its value £20, and judgment was given in his favour, and the defendant appealed, the Court reversed the decision of the Court below on the grounds that there was not sufficient evidence before the Magistrate to justify him in finding that the horse was the property of the plaintiff.

Appeal from a decision of the Acting Resident Magistrate for the district of Albert in an action in which the present respondent sued the appellant for the delivery of a certain horse called *Champion*, or its value, £20.

After certain exceptions had been taken and overruled the defendant pleaded:

1. The general issue.
2. That the horse claimed was acquired *bona fide*, and for valuable consideration at a judicial sale.
3. The defendant denies that the plaintiff is the real owner of the horse, and should the Court find he is the owner, the defendant says that the plaintiff acquired his right to the horse from his guardian, Johannes L. Steyn, and that at the time the plaintiff acquired the horse, if he ever did, the said guardian was hopelessly insolvent and con-

* On the return day the trustee did not appear and the rule was made absolute.—*Rep.*

templated the sequestration, voluntary or otherwise, of his estate; that the said guardian therefore intended to prefer the said plaintiff in preference to his other creditors.

The horse in question was sold by the trustee in the insolvent estate of the plaintiff's father, and was bought by the defendant.

The plaintiff's case was that the horse was his property, and not his father's, and that it had been unlawfully seized and sold by the trustee.

Judgment was given for the plaintiff, the defendant to restore the horse Champion, or its value, £17 10s., and costs of suit.

The following were the Acting Resident Magistrate's reasons:

The Court is of opinion that the plaintiff in this case has clearly proved his ownership to the horse Champion. His evidence, which was given in a clear, straightforward manner, was believed by the Court.

Trust-Me-Not belonged to the plaintiff, and was sold by plaintiff's father against the wish of plaintiff, and in the place of Trust-Me-Not J. L. Steyn (plaintiff's father) gave him the horse Champion, and I am satisfied from the evidence that the transaction was a *bona-fide* one.

Delivery was proven to the satisfaction of the Court by the evidence of plaintiff, Greyvenstein (an independent witness), and J. L. Steyn (a witness for the defence). It was also proved to my satisfaction that from the day of delivery to the date of seizure the horse Champion was in the possession and under the control of plaintiff. The witness D. de Wet, jun., who was called for plaintiff, proved hostile. Application was made to cross-examine him on this account, which was granted. His bearing in the witness-box and the manner in which he delivered his evidence were such that I placed no value whatever upon it.

The only evidence called for the defence was that of J. L. Steyn, who supported the plaintiff's case, and defendant, whose evidence did not touch on the question of ownership.

From this judgment the defendant now appealed.

Mr. Rose-Innes, Q.C., was heard in support of the appeal, and relied mainly on the judgment in *Steyn's Trustees v Steyn* (8 Sheil, 828).

Mr. Fearle for the respondent.

The Court allowed the appeal.

The Chief Justice, in giving judgment, said: It is a most unusual course for this Court to reverse the decision of any magistrate upon a question of fact, but there is no rule of law which binds this Court to accept the decision of a magistrate upon a question of fact. Now, if ever there was a case in which a magistrate ought to have insisted upon having clear and conclusive evidence on the part of the plaintiff, it is the present case. We know

from our experience of insolvencies in this country how usual it is to find that when a man becomes insolvent all his property, and especially his horses, cattle, and sheep, are found to belong to his children, and it is extremely difficult for the trustees in cases of that kind to prove that the property does not belong to the children. Therefore it is essential in a question of this kind, where a minor child claims property, that it should be clearly proved that it is his. Here we have a case in which property is claimed by a minor child who, at the time of this transaction, was not more than seventeen years of age. At that date a promissory note is made by his father in his favour, and a man named De Wet is called, who states that this promissory note included the purchase price of a horse called Trust-Me-Not. The plaintiff denies that it includes the price of this horse, and says that it was in respect of other property, and he mentions sheep, but he gives no details as to how this note was made up to the amount of £78 10s., which he said was owing to him by his father. The Magistrate appears to have given no weight to this promissory note; he says nothing about it in his reasons, and no satisfactory explanation is given with respect to it, and why it was not proved. Mr. Searle says that as they had the horse Champion there was no necessity for proving it. That may be so, but that argument proves that this promissory note must have been in respect of Trust-Me-Not, and that there really was not an exchange of one horse for another. The Magistrate says: "It was proved to my satisfaction that from the day of the delivery to that of the seizure the horse was in the possession and under the control of the plaintiff." Here also the Magistrate is wrong. The admitted facts show that he is wrong. The utmost that can be said is that the horse Champion was in the joint possession of the plaintiff and his father, because the father himself in his evidence says, "I used to use the horse at the slaughter-house; I rode him; he was naturally used in the business, and he stood in my stable." How, in the face of that, the Magistrate can say that the horse was in the possession and under the control of the plaintiff I cannot understand. I am inclined to think that he must have been greatly influenced by the hearsay evidence. There was a great deal of it, and as hearsay evidence it ought not to have been admitted. I quite admit that it was not wholly hearsay, especially with reference to what took place between the father and the son at the time of the transaction. But that transaction may have been merely a colourable one. Witnesses may prove that what they said took place did take place, but that does not prove that it was an honest transaction, and that it was intended in the present case that there should be an exchange of

horses. Under all these circumstances, I find it impossible to hold that this was a *bona-fide* transaction. The Court has already given its decision upon the evidence in the former case. I do not think the evidence was strong enough for the plaintiff to succeed. It was an *actio vindicatio*, and it lay upon the person claiming the property to prove his case. The horse was in the possession of the insolvent, was used by him in his butcher's business, and all the circumstances point to his ownership of the animal. The Magistrate ought to have required clearer evidence that the horse was the property of the plaintiff, and the proper judgment should have been, in my opinion, absolute from the instance. The Court will therefore allow the appeal, and alter the judgment to one of absolute from the instance, with costs in this Court and in the Court below.

Their lordships concurred.

[Appellant's Attorney, G. Montgomery Walker; Respondent's Attorneys, Messrs Fairbridge & Arderne.]

SUPREME COURT.

Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

Re TERBLANS' INSOLVENT ESTATE. { 1898.
Nov. 20th.

On the motion of Mr. Tredgold, Mr. Frederick Hoffa was appointed provisional trustee with full powers of administration.

PRICE V. PRICE.

This was an action by the wife for restitution of conjugal rights, failing which for divorce, by reason of her husband's alleged malicious desertion. Mr. Currey appeared for the plaintiff; the defendant was in default.

Mr. Norman Lacy, Colonial Office, produced the original certificate of the marriage.

Catherine Beattie Price, the plaintiff, deposed that the marriage took place at Port Elizabeth on the 18th December, 1878. She and her husband lived happily together for a year when defendant left on a visit to Cape Town, and she had never heard of him since. She had made efforts to ascertain his whereabouts by advertising and writing to his relations in England, but had obtained no information about him. That was fourteen years ago.

By the Chief Justice: Her husband was a salesman in Fletcher's, Cape Town. He opened in business at Port Elizabeth, and left the business with her. She was not aware he was going away. She heard from inquiries, and it was probable, he went to South Australia, and she got a gentleman who was going over there to make inquiries respecting him, but without result. They were married in community of property. There were no children of the marriage. She had not taken proceedings sooner, because every year she hoped to hear of her husband.

The Chief Justice said that after fourteen years the presumption was that the man was dead.

A decree was granted for restitution of conjugal rights, the defendant to return to or receive the plaintiff on or before the 1st of March, 1894, failing which a rule nisi would be granted calling on the defendant to show cause on the 12th of March why a decree of divorce should not be granted, a division of the property held in community, and the defendant ordered to pay the costs of this action. Service of the rule was ordered to be effected in the same manner as the service of the interdict.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne]

CLAYTON, N.O. V. METROPOLITAN RAILWAY COMPANY AND WALKER { 1898.
Nov. 20th
and 21st.

Interdict—Rectification of transfer—Fraud—Mistake—Duress—Railway—Expropriation—Transfer Deed—Recital in deed—Act 9 of 1858—Compensation—Registration—Servitude

By Act 23 of 1889 the defendant company was empowered to expropriate certain land for railway purposes, with all the powers which are by Act 9 of 1858 bestowed upon the Commissioner of Roads in regard to taking and acquiring lands necessary for the making or repairing of main roads.

A question having arisen between the company and the plaintiff as to the compensation to be paid for certain land belonging to the plaintiff which the company required for railway purposes, it was referred to arbitrators upon the basis of a purchase of the land by the company.

Before transfer the company discovered that the land would not be required for railway purposes, but the plaintiff insisted upon payment of the compensation awarded by the arbitrators.

The company having paid the compensation insisted upon having a clean transfer, whereupon the plaintiff passed a duly registered deed which, after reciting that the company was empowered by Act 23 of 1889 to expropriate land for railway purposes, ceded and transferred the land in question in the usual form without any servitude or restriction of any kind.

Held (a) *that, in the absence of fraud, the plaintiff was not entitled to an interdict restraining the company from transferring the land to the co-defendant Walker, or to claim a rectification of the transfer by inserting the terms of certain agreements alleged to have been made between the plaintiff and the company before reference to arbitration, inasmuch as the plaintiff knew before passing transfer that the company insisted upon a clean transfer, and would not have paid the price or accepted transfer on any other terms; (b) that the recital in the deed could not control the operative part which was unambiguous, and (c) that even if the recital were allowed to control the operative part the reference in the recital to Act 23 of 1889 had not the effect of limiting the company's use of the land to railway purposes in case the land, after being expropriated, was found not to be required for such purposes.*

This was an action instituted by Colonel Valentine Gardner Clayton, commanding the Royal Engineers in South Africa, and as such representing Her Majesty's Secretary of State for War against the defendant company and John Walker for:

(a) A decree perpetually interdicting the defendant company from passing transfer to the defendant Walker of certain portion of the land situated at the Amsterdam Battery, Cape Town, expropriated under Act 23 of 1889 for railway purposes, and coloured blue upon the plan annexed to the declaration.

(b) The rectification of the title deeds of the defendant company to the said portion of land by inserting a clause to the effect that the said portion of land shall not be used for any other than railway purposes, and that no buildings other than temporary buildings of a removable nature shall be erected on the said land.

(c) Further relief, with costs of suit, including the costs of the application made by the defendant Walker in regard to the interdict hereinbefore granted.

The declaration, after referring to the Act under which the company was formed and the powers conferred upon it, went on to allege that:

4. The defendant company agreed with the said Walker to construct the said railway on their behalf and under the powers conferred upon them as aforesaid, and on or about the 20th November, 1889, a written agreement to that effect was entered into between the said parties.

In terms of the said agreement it was wrongfully, unlawfully, and in violation of the rights of the Secretary of State for War and other owners of land, stipulated and agreed that the defendant company should secure as much land as possible under their Act aforesaid, and should transfer to the defendant Walker, on the completion of his contract, all land so acquired and not actually to be used by the company. It was further agreed that the defendant Walker should pay at his own personal cost such sums over the sum of £750 as might be required for expropriation purposes, he being entitled to transfer of the excess land as aforesaid.

5. The defendant company thereafter made certain offers to the representative of the Secretary of State for War for the ground shown upon the plan hereinbefore referred to. The Commanding Royal Engineer, as such representative, was willing that the defendant company should acquire the said land, but upon condition:

(a) That the entire extent of land acquired was to be used for railway purposes only, and

(b) That the station to be erected on part of the land marked blue on the plan, as well as all other buildings placed on the said land, was to be of a temporary and removable nature.

6. The parties thereafter submitted the question of the value of the land so to be acquired for railway purposes to the judgment of arbitrators, who awarded the sum of £1,200 to the plaintiff in respect of such land. The award of the arbitrators was thereafter made a rule of this Honourable Court.

7. The defendant company at the dates when they made offers for the said land, and at the date of the award of the arbitrators aforesaid, did not intend to use the whole of the said land for railway purposes, but they had wrongfully, improperly, and in violation of the plaintiff's rights, agreed with the said Walker to obtain under the Act aforesaid more of the said land than they required for railway purposes, and to transfer to the said Walker for his own private profit and advantage so much of the said land as was not actually used for railway purposes.

8. At the date when the said award was made a rule of Court, the plaintiff was not aware of the arrangement, hereinbefore mentioned, between the

defendant company and the said Walker, nor of the written agreement referred to in section 4 of this plea.

9. The said sum of £1,200 was thereafter paid by the defendant company, and on the 17th January, 1891, transfer of the land indicated upon the plan hereunto annexed was passed to the defendant company. The deed of transfer recited that the land had been expropriated and was transferred for railway purposes; and in consequence of the said recital, the plaintiff did not cause an express provision to be inserted in the said deed, setting forth the conditions which had been agreed to by the plaintiff and the defendant company, and which are detailed in section 5 hereof. The plaintiff says that had he been aware at the date of the transfer aforesaid, that the land in question was not required for railway purposes, but was intended to be sold for the private advantage and profit of the defendant Walker, he would not have consented to the said transfer, but would have taken steps to rescind the order making the award of the arbitrators a rule of Court. Paragraphs 10 and 11 referred to the transfer of a portion of the land in question to Phillips, and in paragraph 12 the plaintiff submitted that he was entitled to have the conditions originally agreed upon with the defendant company, to the knowledge of the defendant Walker, as the conditions under which the land was acquired by the company registered against the title deeds of the defendant company, and that he was also entitled to a perpetual interdict.

The defendants in their pleas admitted the formal allegations in the declaration, they denied that the argument of the 20th November, 1889, was wrongful, unlawful, or in violation of the plaintiff's rights, and said that agreement was drawn up by the plaintiff's attorneys, who then and thereafter acted as attorneys for them (the defendants).

As to paragraph 8 of the declaration, the defendants denied the same, and said that both Colonel Phillips (the plaintiff's predecessor) and his attorneys were fully aware of the terms of the contract of November 20, 1889, above referred to, before the deed of submission, which was drawn up by the said attorneys, was entered into.

As to paragraph 9, the defendants admitted the payment of £1,200 and the transfer of the land as therein set forth, but they denied the other allegations in the said paragraph, and said that the plaintiff, with full knowledge of all the circumstances above referred to, passed a free and unencumbered title to the said company of the said land, having received full compensation for the same.

Finally, the defendants denied that the plaintiff was entitled to the relief sought in paragraph 12 of his declaration or to any relief, and said that

by reason of the terms of Act 28 of 1889, and of the deed of submission and award of arbitrators above referred to, and by virtue of the title deeds held by the said company, the plaintiff was not yet entitled to maintain this action.

Wherefore they prayed that the plaintiff's claim might be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Rose-Innes, Q.C., and Mr. Webber appeared for the plaintiff, and Mr. Searle and Mr. Shell for the defendants.

Mr. Rose-Innes, Q.C., applied to amend the declaration in inserting the following paragraph:

In or about the month of May, 1889, an agreement was come to between the *then Provisional Directors* of the defendant company, who were promoting a Bill to enable the company to construct and work the railway aforesaid, and the then Commanding Royal Engineer, to the effect that the said officer would, on behalf of the War Department, withdraw any opposition to the passage of the said Bill through Parliament, on condition that the nature of the buildings to be erected by the said company on the land expropriated by them in the neighbourhood of the Amsterdam Battery should be in accordance with the agreement come to with the late City and Suburban Railway Company to the effect that any station built there should be of a light structure, easily removable, and to be removed if the War Department required it, and the Company to pay a substantial acknowledgment in recognition of their permissive tenure. In consequence of the said agreement no opposition was offered by the War Department to the passage of the said Bill through Parliament; the said Bill, with certain amendments, is now the Act 28 of 1889 aforesaid.

The Court allowed the amendment, and in answer to the above, the following amended paragraph of the plea was filed:

As to the amended paragraph of the declaration the defendant company says that it admits that before the passing of the said Act a certain agreement was entered into between the promoters of the said company and the plaintiff, and one of the articles of agreement was as stated in the said paragraph: it says that the whole agreement thereafter fell to the ground. At the date of the said agreement, to wit, in May, 1889, the defendant company was not constructed, and was and is in no way bound by the said agreement; thereafter upon the construction of the said company negotiations were entered upon between the said company and the plaintiff upon a new basis, the said negotiations terminated in a deed of submission to arbitration as in paragraph 5 of this plea set forth.

Mr. W. T. Buissinné, of the firm of Messrs. Van Zyl & Buissinné, gave formal evidence as to his acting on behalf of the War Department and as to the deed of transfer being passed, to Mr Walker's verbal assurance that the station would be built on the portion of the plan marked blue.

Colonel Phillips's affidavit was read, in which he alleged that the land was appropriated for railway purposes only, otherwise the passing of the company's Bill would have been opposed.

John Walker, one of the defendants, deposed that he was the contractor for the construction of the Metropolitan and Suburban Railway. He was a director, but not managing director, as stated in the declaration. It was managed by a Board. He was in England when the Act authorizing the railway was passed and promulgated. He returned to the Colony on 7th September and remained until November 20. At the time the contract was drawn up Van Zyl & Buissinné were his attorneys, and any legal work he had passed through their hands. Mr. Van Zyl was chairman of the Railway Company. Mr. Van Zyl and witness drew up the contract, the cost of which was charged to the company. Mr. Van Zyl went carefully through the contract. Witness took the original home to England, and got copies printed. He returned from England on April 30, 1890. Shortly after he came back he handed a printed copy of the contract to Mr. Buissinné. The company commenced negotiations in May, 1890, in consequence of the Harbour Board being in possession of the store which they had contemplated getting. That was the powder magazine, and one of the conditions was that they should pay £200 for it. The War Department was unable to let him have it. It had been transferred by the Colonial Government to the Harbour Board. The company wrote to the Government about it, but never got the store. Upon the recommendation of Mr. Buissinné he saw Colonel Phillips, to whom he gave a copy of the contract. That was at the end of May or early in June. Colonel Phillips pointed out that an agreement had been entered into for putting up a light building as station. Witness said he could not see how that could be done there, and Colonel Phillips said he would wish the line put as far back from the battery as possible, and witness promised to do so. Plans were forwarded to Colonel Phillips showing the line put back from the battery. On July 10 an offer was made to that effect, and the War Department replied that no arrangement had been made with Mr. Walker; also that the whole plot was valued at £1,750, and the red-coloured portion on the plan at £660. Considerable correspondence took place, and finally it was decided that they should go to arbitration. In July it was not decided where the station was to

be. The arbitration took place in September. The company had not paid him within £3,000 of what they owed him under his contract with them. He never heard there would be any objection to giving him free title before he paid the money. He first heard of difficulties in that direction about the middle of November, and correspondence ensued. He consulted Mr. Buissinné, as his attorney, with reference to the transfer. He gave no such verbal promise as stated by Mr. Buissinné, but said he would be glad to give the ground back if the War Department would pay him the proportion of the price.

By the Chief Justice: He had decided not to have the station there at that time. He did not communicate that to Colonel Phillips, but to Mr. Buissinné, whom he informed that the land in dispute was not to be used for railway purposes.

Examination continued: He had paid personally over £1,000 for expropriation of land along the railway, and there were contingent claims for £2,000 more. About November, 1892, he left for England—before the proceedings against the company and Phillips were taken. He came back at the end of April, 1893, and did not take steps to set aside the interdict, because his agent told him it was not necessary. He had sold the land to Mr. Cowling for £1,000.

By Mr. Innes: The other piece, coloured red on the map, he sold to Mr. Phillips for £1,500. He must have known of Colonel Phillips's letter and the reply in September, 1889. He considered that letter was repudiated by Colonel Phillips in June, 1890. Mr. Buissinné was in error in saying he was not aware of the agreement; he had handed him a printed copy of it. He gave another to Colonel Phillips in June, 1890, and he affirmed that in face of Colonel Phillips's letters and of the fact that the records of the office where every document was kept had been searched for it in vain. It was impossible for Colonel Phillips to say, if he saw the correspondence, that the War Department only consented on the understanding that the land was to be used for railway purposes only. He offered £80 per annum before he fell back on his rights under the Act and expropriated.

By the Court: The station was not yet built. The traffic did not warrant it, he believed.

By Mr. Innes: He did not want the land then because he had not the money.

Mr. Justice Buchanan: Why did you take it then, when you did not want it?—I thought I had to.

By Mr. Innes: He could have done without the land if he could have saved the paying of the money. He saw Colonel Phillips's letter urging him not to expropriate the ground marked blue.

Re-examined by Mr. Searle: An offer was made on July 24, 1890, by Mr. Solomon on the part of

the company with a view to his taking only one of the pieces of land at the arbitration.

By the Court: He did not finally decide for a year afterwards that no station should be there. He had not definitely decided at the time of the transfer as to whether he would use the land for railway purpose.

Charles Edward Solomon, formerly secretary and now one of the directors of the company, deposed that the company at that time was not able to pay Mr. Walker £3,000 of his contract. He was present at the arbitration. He corroborated Mr. Walker's evidence as to their being no restrictions in the title of the land. He conducted the correspondence with Colonel Phillips, and certain of the directors had an interview with him by the advice of Van Zyl & Buissinne, their solicitors, before the Bill went through the House. The company was not formed until about a year after the passing of the Act. There was a provisional Board of Directors, of which Mr. Van Zyl was chairman.

By Mr. Innes: The provisional directors were set forth in the Act, and the promoters were mentioned in the Blue-book of the minutes of the Select Committee. Messrs. Van Zyl & Buissinne were solicitors for the company down to November 18, 1890. On the eve of an action they left the company in the lurch and resigned.

By Mr. Searle: That was the litigation by the Green Point and Sea Point Municipality.

Samuel Tonkin, one of the arbitrators in the arbitration between the company and War Department, deposed that the award was £1,595: £1,200 in respect of the Amsterdam Battery land and £395 in regard to the Three Anchor Bay plot. No restriction was brought before the arbitration. Evidence was given of the value of the land as building sites.

By the Chief Justice: Mr. Walker desired to put in a Blue-book containing the letter mentioned, but Mr. Buissinne objected on the part of the War Department, and it was not admitted.

Mr. Rose Innes, Q.C., in support of the plaintiff's case contended that it was perfectly clear that the land in question was not purchased in the ordinary way. It was expropriated under the powers given by the Act. It was true that the War Department originally contemplated another arrangement, by which they would allow the defendant company a permissive tenure.

Under the Act if an appreciable piece of ground were taken and used for other than railway purposes the owner who had been forcibly deprived of it under the Statute had some remedy in law unless he had contracted himself out of the Act or waived his rights.

The English law was clear on the subject, and the same principle should be applied in the present

case, see the following cases: *Mulliner v. Midland Railway Company* (11 Ch. Div., 641); *Galloway v. Mayor, &c., of London* (1 E. & L. App., 34); and *Lord Carrington v. Wycombe Railway Company* (8 Ch. App., 877); *Greene v. West Cheshtre Railway Company* (18 L.R., Eq., 44); *Storer v. Great Western Railway Company* (2 Y. and C., 48); *Raphael v. Thames Valley Railway Company* (2 Ch. App., 147); *Le Neve v. Le Neve* (2 Tudor's L.C. in Equity, 32).

He also cited Act 9 of 1858, sections 11 and 12; *McDonald v. D.E. of N.E. Railway* (7 Juta, 290); *White Bros. v. Treasurer-General* (2 Juta, 322); *Executors of Pretorius v. Executors of Burger* (3 Ros, 26); *Jansen v. Fincham* (2 Sheil, 230), and urged that the transfer deed passed to the defendant company, although unconditional, could not override the Act of Parliament under which the land had been expropriated for railway purposes only.

The Chief Justice: In any of these cases had a free unencumbered transfer been passed?

Mr. Rose-Innes: That is not quite clear, although reference is made in some of the cases to a statutory transfer. Before transfer had been passed the War Department could have obtained an order preventing the land from being alienated for other than railway purposes. Mr. Walker and the company were in the same position. As to the question of the knowledge of the plaintiff of the agreement mentioned in the evidence. If Mr. Walker was correct in saying that Colonel Phillips knew of the agreement all along it went very much against the plaintiff's case. He asked the Court to consider whether Mr. Walker was not incorrect in making that statement. The whole correspondence was inconsistent with Col. Phillips knowing the position between the company and Mr. Walker, and this was also shown in the affidavit. He asked the Court to find that on this point Mr. Walker's memory was defective. The War Department were general clients of Van Zyl & Buissinne, and Mr. Van Zyl as chairman of the Provisional Board of Directors signed this agreement. This did not show knowledge on the part of Colonel Phillips, as it was not until July, 1890, that the matter was put into the hands of the firm by the War Department, the work of which was done by Mr. Buissinne. The correspondence did not corroborate Mr. Walker's statement that he made Mr. Buissinne aware of the agreement at the time he stated. Mr. Walker's memory on that point must be defective.

The first intimation Mr. Buissinne had of the agreement was in December, 1890. As to the transfer, Mr. Walker was armed with the award of the arbitrators which had been made a rule of Court.

The Chief Justice: There was nothing in the award stating that transfer should be passed. I

should like to hear the question fully argued as to whether the War Department was compelled to give transfer at all.

Mr Innes: The War Department have rights under the Act which they asked the Court to enforce.

The Chief Justice: They surrendered their rights under the Act. The transfer gave the land in full and free property.

The Chief Justice: There is only one point on which the Court wishes to hear counsel for the defendants. No stress has been laid upon it for the plaintiff, though some might have been. In the preamble to the transfer deed the Act is recited, and may it not be fairly argued that on the true construction of the transfer deed as it stands the Act governs the operative portion.

Mr. Searle (with him Mr. Shell) for the defendant company and Walker. The preamble to the deed is merely declaratory, and no reference is made in the operative part of the deed to the land being conveyed for railway purposes only.

The transfer was unconditional, and the intention of the parties is immaterial.

There is no allegation of fraud, error, or duress. The passing of the deed was equivalent to a judgment of the Court, and cannot be set aside by a private Act of Parliament which is a mere contract between the parties.

The following authorities were also cited and discussed: *Saayman v. La Grange* (Buchanan, 1879, p. 10); *White Bros. v. Colonial Government*; *Cape of Good Hope Bank v. Fisher* (4 Juta, 868); *Heathie v. Colonial Government* (5 Juta, 856); *Landmark v. Van der Walt* (8 Juta, 800); *Harris v. Buissinne's Trustees* (2 Menzies, 106).

Mr. Rose-Innes, Q.C., replied.

The Court granted absolution from the instance with costs.

The Chief Justice said: The case has been very ably and elaborately argued on behalf of the plaintiff, as representing the Secretary of State for War, but the decision of the real issues raised by the pleadings must after all depend upon the effect which the law of this colony gives to a transfer of land by duly registered deed, and upon the proper construction of the particular transfer deed passed by the Commanding Royal Engineer in the defendant company's favour. The declaration asks for an interdict restraining the company from transferring a portion of the land comprised in the transfer deed to the defendant Walker, and for a rectification of the deed by inserting a clause to limit the use which the company can make of the land thus transferred. In support of these claims the plaintiff relies upon certain agreements between the plaintiff's predecessor in office and the promoters of the company limiting the use which the company

could make of the land, and upon the fact that an agreement had in November, 1889, been made between the company and Walker that the former should acquire as much land as could be acquired under the Act which authorised the construction of the company's railway, and should transfer to the latter, who was the contractor for the construction of the railway, all land not actually to be used for railway purposes by the company. The declaration, as originally filed, alleged that this agreement was a fraudulent one, but the charge was subsequently withdrawn and the declaration amended accordingly. The plea, while not admitting the agreements as alleged for limiting the company's use of the land, avers that any previous arrangements between the Commanding Royal Engineer were put an end to by the subsequent negotiations which resulted in the transfer of the land to the company. As to the agreement between the company and Walker, the plea, while not admitting that the particular land now in question had been acquired with the view of being transferred to Walker, alleges that during all the negotiations the Commanding Royal Engineer had notice of the agreement, and that the transfer was passed with his full knowledge that the company intended to avail itself of all the rights which an unconditional transfer would confer on it. At the outset it must be made perfectly clear that the question does not arise in the present case whether the particular land in question was expropriated with the *malafide* object of being used for other than railway purposes. It has been proved that the agreement between the company and Walker was never concealed from the plaintiff's predecessor, and that it was well known to his duly-appointed agent long before transfer was passed, if not before the negotiations for arbitration commenced. It is not for the Court now to say whether such knowledge rebuts the *prima-facie* proof of fraud, because the charge of fraud has been withdrawn. When the first application for an interdict restraining transfer to Walker was made, the Court was informed that the land had been acquired in pursuance of the agreement, and that this agreement had been concealed from the plaintiff's predecessor. The Court therefore had no difficulty in granting the interdict, but gave leave to Walker to move to set it aside. A motion to that effect was subsequently made, when the Court ordered the interdict to continue until a certain date, but to be discharged in case the plaintiff should not by that date have obtained a perpetual interdict. The main object of the present action is to obtain such an interdict, and for the purpose of our decision we must assume that the land now in question was in the first instance *bona fide* required for railway purposes, that before transfer the company ascertained that the land

was not so required, and that the War Department insisted upon payment of the price, and passed transfer with the full knowledge that the land was no longer required for such purposes, but was intended to be transferred to Walker. What effect then does our law give to a duly-registered transfer of land? The registration is a judicial act by virtue of which the full ownership passes from the transferor to the transferee. No servitude, incumbrance, or other restriction upon the full ownership can be imposed without registration thereof in the Deeds Office and endorsement upon the registered deed. So long as a clear transfer stands registered the transferee enjoys the full rights of ownership, subject only to such exceptional rights as might be acquired by a lessee on a short lease, or by prescription, and to such tacit hypothecations as are recognised by law. But no prior agreement between the transferor and transferee can be set up to control the effect of the transfer, for the deed, when completed by the judicial act of registration, is regarded as embodying the final agreement between the parties. If the transfer has been induced by the fraud of one of the parties the Court may, by way of *restitutio in integrum* set it aside altogether. So the Court may, under certain circumstances, set it aside, or, if need be, vary it on the ground of *justus error*. If the transferor or his agent has made a mistake by omitting to insert the terms of the original agreement the transferee, if he has not accepted the deed under circumstances showing consent to a departure from such agreement, is entitled to claim a rectification of the deed. In *Saayman v. Le Grange* (Buch, 1879, p. 10) a transfer deed which, by mistake of the transferor, varied from the terms of the deed of sale of the land, was ordered to be rectified at the suit of the transferee, more than forty years after transfer, upon clear proof that the occupation had always been in terms of the deed of sale and not of the transfer deed, and that the mistake had only been discovered within the period of prescription. In *Richards v. Nash* (1 Juta, 312) the transferor of a portion of his land omitted to register on the title deed of his remaining extent a right of way which he had agreed to give to the transferee and his assigns, and it was held that the transferee was entitled, even as against a purchaser of the remaining extent with notice of the agreement, to have the right of way registered upon the title deed of such remaining extent. No case has, to my knowledge, arisen in which the Court has ordered a rectification at the suit of the transferor, but cases might be conceived in which he would be entitled to relief. If, for instance, the agreement was for the sale of Whiteacre, but through the transferor's own mistake Blackacre was trans-

ferred, there would be no reason in law, subject of course to the rights of subsequent *bona fide* purchasers, why the transferor should not be relieved. It would be different if the transferee believed, and was justified in his belief by the terms of his agreement, that Blackacre had been sold. In *Heathie v. Colonial Government* (5 Juta, 358) the Government had sold and granted certain land upon which a house stood, and the purchaser had paid the price and received the grant in the belief that the house was sold with the land, and it was held that the Government could not afterwards claim a rectification of the grant by excluding the house, on the ground that at the time of the sale the Government intended to retain the house for railway purposes. Upon analogous principles it is clear that, in the absence of fraud, a transferor is not entitled to relief who has passed a transfer departing from the terms of the original agreement between the parties with the full knowledge that the transferee insists upon such departure, and will not pay the price or accept transfer upon any other terms. In such a case the transferor could not afterwards set up his ignorance of the true legal effect of the transfer, for the transferee is entitled to say that, as he laboured under no such mistake, he is entitled to the full legal benefit conveyed by the transfer. The next question then arises whether there is anything in the transfer to the company which limits its rights of ownership. The transferor "*cedes and transfers the land in full and free property to the company, and declares himself to be entirely dispossessed of and disentitled to the same, and that the company shall henceforth be entitled thereto conformably to local custom; moreover promising to free and warrant the property thus transferred, as also to clear it from all incumbrances and hypothecations according to the laws respecting the purchase and sale of landed property*" It is contended for the plaintiff that, inasmuch as the recital refers to Act 28 of 1889 as empowering the company to expropriate land for "railway purposes," the rights of the company to land so expropriated must be limited to such purposes. But the recital can only control the operative part of the deed if the operative part is doubtful in its meaning. No words can be less ambiguous than those employed to transfer the land to the company. Not only is no servitude or other limitation imposed, but the transferor promises to clear the land from all incumbrances according to the laws respecting the purchase and sale of landed property. Under the operative part of the deed the transferor would have been legally bound, in case the property was already subject to a servitude limiting his own use to certain specific purposes, to clear the land of the servitude or pay damages for breach of his

warranty. The recital cannot, therefore, be held to impose servitudes which are excluded by such clear language used in the operative part. But assuming that the recital may be allowed to have that effect, does the recital itself clearly show that full rights of ownership were not intended to be conferred on the company as against the transferor. The Act to which the recital refers contemplates, it is true, that land shall only be expropriated for railway purposes, but it is silent as to what is to become of land which, after being expropriated for railway purposes, is found not to be required for such purposes. Does such land revert to the former owner even if he has received the full price for it, or may the company after paying for it and receiving transfer treat the land as its own? The English Acts of Parliament, which make special provisions for such cases, and the English decisions founded upon those Acts, cannot guide the Court in answering these questions. The 6th section of the Act enacts that "all and singular the powers, which are by the Public Roads Act No 9 of 1858 bestowed upon the Commissioners of Roads in regard to taking and acquiring lands and materials necessary for the making or repairing of any such main road as in the said Act is mentioned, or of any works in connection therewith, are hereby bestowed upon the directors (of the company) precisely as if the said powers were, *mutatis mutandis*, herein again set forth, and as if the said railway were a public road." The proviso to the section defines the area to be expropriated but does not otherwise limit the directors' rights. The 12th section of Act No 9 of 1858 enacts that "if any such Commissioner of Roads should require to take or use any land for road purposes he may treat and agree with the owner for the purchase or hire, as the case may be, of any such lands. . . . and may enter into any contract relative to the obtaining of such land . . . upon such terms and conditions as he should judge expedient." If they do not agree upon "the purchase money, hire, or other recompense," then the Commissioner is to make an offer in writing of the amount which he is willing to give, and if the offer is not accepted, he may ask for the name of the owner's arbitrator, and upon receiving the name of the person so selected, he must nominate a second arbitrator and cause a deed of submission to be prepared "which shall clearly set forth the matter to be determined by such arbitrators." It is clear then that a hire or any other lawful contract for acquiring the land is permitted, and that it is not necessary, for the purpose of expropriation, that there should be a sale of the land. But if the compensation is awarded upon the basis of a sale the Commissioner becomes a purchaser of the land with all the rights of a purchaser. In *Landmark v. Van der Walt* (8 Juta, 800) this

Court held that after the Government had, under similar powers, expropriated certain land for railway purposes, the former owner of the land could not restrain the use of the land for trading purposes by persons who had received authority from Government so to use it. The transfer deed in the present case, prepared and registered by the conveyancer appointed by the War Department, recognises the transaction as a sale and does not, even if controlled by the recital, restrain the rights of the purchaser, after payment of the full price, to a mere user of the land for railway purposes. It follows that, in our opinion, the plaintiff is not entitled to succeed in this action. On the 25th of July, 1890, the plaintiff's predecessor informed the company that he had placed the subject of the arbitration and other matters in connection with the passage of the railway through War Department ground in the hands of Messrs. Van Zyl and Buissinne, attorneys-at-law, and on the same day the attorneys wrote to the company asking what compensation the company was prepared to pay. On the 29th of July the company wrote in answer that Mr. Walker, to whom the company's powers under the Act had been transferred, was prepared to purchase the land upon a perpetual quitrent lease, at the price of £80 per annum, with the option of redemption at twenty years' purchase. The offer was not accepted, but arbitrators were appointed and a deed of submission signed by the parties for the assessment of the compensation to be paid upon the basis of a sale. The amount was assessed at £1,200, and on the 9th October the attorneys demanded payment of the money. On the 15th a pressing request for settlement was again made by the attorneys, with the intimation that they had the papers to pass transfer on payment of the compensation. Further pressing letters were sent, and on the 27th the company was informed that unless the sum awarded was paid on the following day a writ of execution would be issued. The money was therefore paid upon the attorneys undertaking "to hold this amount until such time as the Commanding Royal Engineer shall pass transfer of the property." On the 28th of November the attorneys wrote to Mr. Walker that they were preparing the transfer to the company and that as they did not understand the agreement between him and the company to vest the land in him "there must be two transfers, one from the War Department to the Railway Company and another from the company to you." In a postscript the writer adds: "It is a question whether the company can expropriate any land not actually to be used by them, and if any portion of the land is not used by the railway eventually it might be objected to. The evidence shows that by this time, if not before the money had been paid to the attorneys, they, as well as

the company, knew that the land would not be required for railway purposes. It also shows that the company would have preferred to keep the money rather than have the land, but the attorneys insisted upon having the money, and after they had received it they never offered to return the money instead of passing transfer to the company. On the 18th of December the attorneys wrote to the company stating that they were endeavouring "to induce the Government to forego transfer duty on the transfer by the company to Mr. Walker," and asking for a statement in writing that the station was to be erected on a certain portion figured *a, e, f, g, a*, on the diagram. Walker promptly replied that it was impossible to give the undertaking, but that if the War Department was prepared to refund £450 of the amount paid, and include another small extra area required at Three Anchor Bay free, arrangements might be made to allow the War Department to retain *a, e, f, g, a*, at Amsterdam Battery. The proposal seems to have been reasonable enough, for the portion so figured comprised the land originally destined but no longer required for a railway-station, and the extra area at Three Anchor Bay is admitted to be an insignificant strip of land. The reply was that the proposal could not be entertained for a moment, and that the position would have to be reconsidered unless Walker gave the previously required undertaking in writing. In the same letter Walker is reminded that he had informed the writer that he would not make use of the land expropriated for other than railway purposes. On the following day (23rd December), Walker wrote in reply denying that he had given such a promise, and reminding the attorneys that they had prepared the agreement between him and the company. Further correspondence ensued, in the course of which the attorneys denied the right of the company to transfer the land to Walker and gave notice that unless an assurance were forthwith given by the company and Walker that the land would not be used for other than railway purposes an interdict would be applied for. No such assurance was given, and instead of an interdict being applied for transfer was passed in favour of the company on the 17th January, 1891. After transfer had been passed, viz., on the 29th January, the attorneys sent to the company the diagrams of the property which the company proposed to transfer to Walker, and in the letter enclosing the diagrams they warn the company against using the land for other than railway purposes. And now, nearly three and a half years after transfer, the plaintiff, without alleging fraud, duress, or mistake, but relying upon agreements alleged to have been made before the deed of submission was executed but not therein referred

to, seeks to restrain the transfer to Walker, and to rectify the transfer to the company by inserting a servitude in favour of War Department property. Mr. Buissonné, to whom the company was referred by the War Department, is an attorney and conveyancer of long standing and experience, and he surely ought to have known that, if the agreements were still in force, they ought to have been mentioned in the deed of submission, or, if not so mentioned, that the proper time for inserting their terms into the transfer deed was before final registration. If he was not bound to pass a clean transfer the whole matter was in his hands, and he could have refused to pass a transfer without conditions, or when he knew that the land would not be required for railway purposes, he might have tendered back the compensation money and refused transfer altogether. His reasons for refusing are that he thought that the terms of the Act, as recited in the deed, protected his client and that he wished to avoid litigation. But the correspondence shows that he knew that the company would place a different construction upon the deed, and would claim the right to deal with the land as they pleased after transfer. The plaintiff does not even now tender any portion of the price which was paid by the company, and which the company would not have paid for a transfer with limited rights. The argument that the alienation of the land for other than railway purposes would interfere with the military defences of the town cannot affect the legal rights of the defendants, especially when it is borne in mind that by Act 8 of 1887 the Government has the power of expropriating land for defence purposes, upon payment of compensation to be determined by arbitration. Under ordinary circumstances the result would be that there must be judgment for the defendants, but seeing that the plaintiff might possibly be entitled to relief if his action were brought in a different form and founded upon additional facts, the Court will grant absolution from the instance, but the costs must be paid by the plaintiff.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissonné; Defendants' Attorneys, Messrs. Weesels & Standen.]

IRVINE V. IRVINE.

{ 1898.
Nov. 21st.

This was an action for judicial separation instituted by Mrs. Irvine against her husband on the grounds of her husband's intemperance, cruelty, and neglect to provide for the support of the plaintiff and of the children of the marriage.

The declaration alleged that the parties were married in community of property in Cape Town

on the 2nd October, 1888, that there were two children of the marriage, and that the acts of cruelty complained of took place in the years 1890 and 1892, but more especially on the 2nd February, 1898.

The prayer was for :

(a) A decree of judicial separation *a mensa et thoro*.

(b) Division of the jointestate.

(c) Custody of the children.

(d) Further relief, with costs of suit.

Mr. Maskew appeared for the plaintiff; the defendant in person.

The marriage was admitted by the defendant.

Elizabeth Jane Thompson Irvine, the plaintiff, deposed that she was married on October 2, 1888, at the Scotch Church, Cape Town, in community. There were two children, a boy of eight and a girl of seven. Her husband ill-treated her and the children. After they were a year married the ill-treatment commenced. He used to keep the money, and she was obliged to ask for everything. He stayed out late at night, and when she remonstrated he butted her with his head in the chest. He also struck her. When he was in the employment of the Sea Point Tramway Company he frequently beat and abused her, pulled her by the hair, and put her out of the house. He took her sewing machine and everything she had and gave the machine to a person who had since been married. She lived with her mother after being turned out. He came up to the house and molested her there, and threatened her life. She had the children with her, and he took them away in November or December, 1891. She had recovered them, with the aid of a sergeant of police, from the house in which he placed them and which did not bear a very good name. In February, 1898, he threatened to kill her, and smashed the windows against her face. He dragged her about, struck her, and threw her into the street. He was taken before the Magistrate, and fined for the assault. He had ceased to contribute to her support and that of the children since 31st October, 1891. He was of loose habits, and drank continually.

Cross-examined by the defendant : She left him for his ill-treatment at Sea Point. It was not for ill-treatment of her mother, though he had pulled her hair out also. She did not accuse him of misconduct with a girl at Sea Point, but he had admitted that he had committed himself on the beach. She had not misconducted herself with any man. She was not the cause of getting him dismissed from the railway; she did not advise him to go to Kimberley, nor to enlist, nor to go to Worcester, nor to go up-country. He went away to England as fireman on board the Tartar, and left her with only sixpence.

The defendant said the whole cause of the trouble was the old woman, whom he pointed out in the Court, and who he said was his mother-in-law. He wanted to support his children and his wife. He never saw the inside of a prison until he saw his mother-in-law. He said the old lady ought to be dead.

The Chief Justice said defendant ought not to make such remarks in court.

Defendant said he was a wagon-driver, and plaintiff stated, in reply to the Court, that she earned her living as a dressmaker.

In further cross-examination, the plaintiff denied that she picked a quarrel with him on his return from England, or that she threatened to stab him with a knife. She had not a bad temper. She denied that she refused to recognise him subsequently at the military sports because he was in his working clothes. She received a letter from him that he was very ill in Somerset Hospital, but she took no notice of it, not believing it. She had refused to let him see the children.

By the Court: They say I struck him with a smoothing iron, but I can't say that I remember it. I had the smoothing iron in my hand. My mother was not the cause of the estrangement. He did not beat the children, but shook them. I teach the children myself.

In reply to Mr. Maskew, she said if she struck her husband it was in self-defence.

Janet Betty Muir, mother of the plaintiff, gave corroborative evidence of the alleged cruelty.

By the Court: She was not the cause of the trouble. As soon as plaintiff's money failed defendant forced quarrels on her.

William Fitz Clarence Buchanan, Woodstock, deposed that he knew plaintiff and defendant. He gave evidence of the assault on the 2nd February, for which defendant was fined. Defendant was a man of loose, drunken habits.

J. M. Shaw, Woodstock, gave similar evidence, and testified to the good character of the plaintiff.

Defendant asked to be allowed to see the children every week.

The Chief Justice : I think the parties will be able to come to some agreement as to the times and places at which the defendant will have access to the children. If they cannot, then either party may apply to the Court. A decree will be given for separation from bed, board, and cohabitation, plaintiff to have custody of the children, and defendant to have access to the children at such reasonable times and places as may be agreed upon between the parties, and failing such agreement, at such times and places as the Court may hereafter appoint.

[Plaintiff's Attorney, W. H. Moore.]

SUPREME COURT.

Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.O.M.G.

PROVISIONAL ROLL.

STEVENS V. VAN STRAATEN AND { 1898.
ANOTHER. { Nov. 23rd.

Mr. Buchanan moved for a decree of civil imprisonment against the two defendants. Provisional judgment was obtained on a promissory note on April 12 for £85 4s. 6d., and a writ of execution was taken out on April 17, on which £18 18s. 9d. was realised, the sheriff returning *nulla bona* with respect to the balance.

The order was granted.

HEYDENRYCH V. VINTCENT.

Mr. McLachlan moved for provisional judgment of an acknowledgement of debt for £96, and also prayed that the inheritance pledged for the debt be declared executable.

Provisional sentence was granted, but the inheritance was not declared executable, there being no prayer for such an order in the summons.

GARLICK V. VERCUEIL.

Mr. Buchanan applied for judgment under rule 320 for £24 5s. 6d., for goods sold and delivered. Granted.

REHABILITATION.

The following rehabilitation was granted on motion by Mr. Shell: Tristram Woolridge.

ZACKON V. ARP'S TRUSTEE AND { 1898.
OTHERS { Nov. 23rd.

Insolvency—Ordinance 6 of 1843, Section 84
—Undue Preference—Trustee—Co-defendant—Action.

Application on notice calling upon the respondents, Everett Rood, in his capacity as the sole trustee of the insolvent estate of Heinrich Ferdinand Ludwig Arp and as an individual, the said Arp, and the Honourable Petrus Benjamin Van Rhyn to show cause why the applicant should not be empowered by the Court to institute upon his own responsibility an action to have the general bond for the sum of £500, passed of date 17th April, 1893, by Arp in favour of Van Rhyn, and ceded by the latter to Rood as an individual, set aside as having been granted in contravention

of the provisions of Ordinance 6 of 1843, section 84; also why Rood in his capacity as aforesaid should not be ordered to become a party to the said action as co-defendant along with the other respondents above named; or why the said Rood, in his capacity aforesaid, should not be ordered to allow his name to be placed on the records as plaintiff or co-plaintiff with the applicant in the said action; or why he should not be ordered to be removed from office as having an interest adverse to the interests of the general body of creditors, and proceedings ordered to be taken for the election of a fresh trustee or trustees who shall institute the said action, the applicant being ready to have the action aforesaid instituted and prosecuted at his own cost; also why the costs of this application should not be ordered to form part of the costs of the said action. The applicant alleged in his affidavit that he was a creditor to a large extent in Arp's insolvent estate and had duly proved his claim; That the estate was sequestrated on 17th June last, and that Rood, Van Rhyn's son-in-law and bookkeeper, was appointed and confirmed as sole trustee.

That on 17th April, 1893, the insolvent passed a general notarial bond in favour of Van Rhyn bearing to be for cash lent and advanced. The bond was registered on the same day.

The applicant alleged that he was satisfied and ready to prove that the said bond did not represent cash then advanced, or value then given, but was passed by the insolvent in favour of Van Rhyn with intent to prefer him, then a creditor, before his other creditors at a time when the insolvent was contemplating the sequestration of his estate.

That at or about the time of the sequestration Van Rhyn ceded the bond to Rood, as an individual, who proved the same against the insolvent estate. That Rood had stated that he had received the said bond as a gift.

That at the third meeting in the said estate held at Van Rhyn's Dorp on 19th September last applicant moved, through his agent, that the trustee be instructed to take immediate steps to have the said bond set aside as an undue preference.

That this proposition was opposed by Van Rhyn and Rood, as an individual, and as representing other creditors, and they in this way obtained a majority of votes, the Magistrate declaring their counter proposition to the effect "that the bond be not set aside" carried.

The applicant craved leave to refer the Court to the record of the proceedings in the said estate filed with the Master, and alleged that he was prepared at his own risk and cost to proceed with an action to have the said bond set aside.

The respondents, through their attorneys, assented to so much of the application as

requested leave for him to sue in his own name, but they intimated that the application to remove the trustee from his office would be opposed.

The applicant refused this offer and insisted upon the matter coming before the Court.

Mr. Rose-Innes, Q.C., was heard in support of the application.

The following cases were cited and discussed: *Turner & Co v. Schaefer* (2 Juta, 101); *In re Hall* (4 Juta, 278); *Trustees S.A. Bank v. Wilson* (4 Juta, 172).

Mr. Searle for the respondents.

The following order was made: The respondents consenting, the Court authorises the applicant to bring an action for undue preference against Van Rhyu and Rood on condition that the trustee, in his capacity as such, be made a co-defendant.

[Applicant's Attorney, G. Montgomery Walker; Respondents' Attorneys, Messrs. Fairbridge & Arderne.]

CONTAT V. CONTAT'S TRUSTEE AND { 1898.
THE ATTORNEY-GENERAL. { Nov. 23rd.
and 24th.

Insolvency—Proof of debt—Fine—Alternative of imprisonment—Insolvent's *locus standi*—Diamond Trade Act, 1882—Execution of sentence: for payment of fine—Judge's warrant—Ordinance No 6 of 1839.

In case of the insolvency of a person who has been convicted of an offence and sentenced to pay a fine without an immediate alternative of imprisonment, or a subsequent special commitment by virtue of Ordinance 6 of 1839, the person, in whose favour the penalty has been imposed, is entitled to prove the amount of the fine in competition with the other creditors of the insolvent.

The insolvent has no locus standi for the purpose of expunging the proof, if the only question is whether the person who has obtained a judgment for the penalty is entitled to compete with the other creditors.

The 56th and 57th sections of the Diamond Trade Act, 1882, were intended to provide speedy means for the execution of a sentence for the payment of fines inflicted under the Act and not to deprive the Government of its right by other means to recover the balance of the fine, if sufficient has not been levied under the Judge's warrant.

Where the sentence imposing the fine gives an alternative of imprisonment on "non

payment" of the fine the accused may, in the absence of express provision to the contrary, prevent the execution of the judgment for the amount of the fine, by electing to serve his full term of imprisonment.

This was an application on notice calling upon the respondents to show cause why the proof of debt filed by the Colonial Government against the applicant's insolvent estate should not be set aside and expunged, and why the liquidation and distribution account filed by the trustee should not be amended accordingly.

The facts are these:

On the 5th March, 1888, the applicant was convicted before the Special Court at Kimberley for contravening section 8 of the Diamond Trade Act, 1882, and in addition to a term of imprisonment was adjudged to forfeit the sum of £1,000 sterling.

Thereafter, under the provisions of section 50 of the Act, a warrant of execution under the hand of the judge who presided in the said Court was issued on the 8th June, 1888.

By virtue of this warrant all the movable property then belonging to the applicant was seized and taken in execution, and was thereafter sold under the said writ. There was realised thereby the sum of £182 1s.; the net proceeds thereof, amounting to £124 17s 4d, were paid over to the clerk of the Special Court on the 27th July, 1888.

The applicant alleged that when his assets were sold they were of considerable value, but were sacrificed by being sold in the manner aforesaid.

That thereafter he instituted an action against H. A. Ward and others, in which he was unsuccessful, and costs were given to the defendants.

Thereafter Seavill and the Estate of Eland sequestrated applicant's estate as insolvent.

At the second meeting of creditors the Colonial Government proved against applicant's estate for the balance of the fine imposed by the Special Court, namely, the sum of £875 2s. 8d. The total claims proved against the estate amounted to £1,467 4s.

At the third meeting of creditors applicant's agent filed a protest against the claim of the Government.

Thereafter the trustee filed his liquidation and distribution account, whereby he awarded the Colonial Government a dividend of £144 18s. 9d.

The applicant alleged that he believed the claim of the Government was not admissible, and could not be proved against his estate, and that the said claim had no longer any force, and that no writ, levy, or other proceeding could be taken against him for the recovery thereof.

The applicant further alleged that he believed that if the claim of the Government were expunged

he would be able to raise sufficient funds to pay off the other creditors who had proved claims against his estate, but that he was unable to discharge in full the claims, including that of the Government. That the money distributed by his trustee in the account was derived from the proceeds of the sale of a claim which he had against Ward and others, in respect of which sale he intended to take proceedings hereafter.

That at the time of his arrest he had acquired certain rights in respect of certain diamondiferous farms belonging to the Wessels family, but no right of action and no proceeds or profits therefrom had accrued to him at the time.

Mr. Searle was heard in support of the application and contended that the rule of law was that where a statute provided a special remedy for the satisfaction of a penalty there was no common law remedy in debt as well. See *Underhill v. Ellicombe* (McC. and Y, 450), *Stevens v. Evans* (2 Burr, 1,152), and *L. & B. Railway Company v. Watson* (4 C.P.D., 118.). See also 8 and 9 Vic., cap. 20, secs. 145 and 151, and 18 Geo III., cap. 78, sec. 84. Fines and penalties are usually in criminal and quasi-criminal Act of Parliament made recoverable specifically in Resident Magistrate's Courts. See Act 16 of 1892, sec. 76.

A penalty is not a debt in the ordinary acceptation of the term.

The Attorney-General (Mr. Schreiner, Q.C.), for the Government: The cases cited have no application, as there was no judgment in those cases. Here the Government have their judgment, which is a legal debt upon which they proved. The Government are in a better position than ordinary creditors.

Mr. Buchanan, for the trustee, submitted to the judgment of the Court.

Mr. Searle in reply.

Curia ad vult.

Postea (November 24).

The Court delivered judgment.

The Chief Justice said: This case raises for the first time the important question whether, in case of the insolvency of a person who has been convicted of an offence and sentenced to pay a fine without an immediate alternative of imprisonment, or a subsequent special commitment under Ordinance 6 of 1839, the person in whose favour the fine has been imposed is entitled to prove the amount in competition with the other creditors of the insolvent. The first observation I would make is that the applicant, who is the insolvent himself, appears to have no *locus standi* for the purpose of expunging the proof of debt made by the Government against his estate. He would of course be entitled to object to the proof of any claim which could not be enforced against himself if he were solvent, but where a valid claim against

himself exists he is not the person to object to the Government competing with his creditors. In the present case the Government, even if not at liberty to compete with the creditors, would clearly be entitled to satisfaction of the fine out of any balance remaining after payment of the creditors. Only a small portion of the fine has been paid, and the insolvent has not undergone imprisonment or been sentenced to imprisonment, on non-payment of the fine. I prefer, however, not to decide the case on any technical ground, lest the creditors of the applicant should be led to believe that they have a good ground for expunging the proof on its merits. It is certainly a hardship on them that the insolvent's offence should diminish the fund out of which their debts are payable, but the same remark would apply to other claims where the right of proof is unquestionable. An assault, for instance, committed by him before his insolvency would give rise to a civil action as well as to a criminal prosecution, and any damages given in such civil action would undoubtedly be provable against his estate. The cases cited from the English Reports have no application to a case like the present. In none of them had a judgment for the payment of a penalty been given by a competent Court. In *Stevens v. Evans* (2 Burr, 1,152), upon which the other cases cited were founded, it was laid down by Denison, J., that upon a new Statute which prescribes a particular remedy no remedy can be taken but that prescribed by the particular Statute. In the present case the fine of £1,000 was imposed on the applicant for a contravention of the 3rd section of the Diamond Trade Act, 1882. There was no alternative sentence of imprisonment on non-payment of the fine nor could there be a special commitment under Ordinance No. 6 of 1839. The 56th section of the Act of 1832 enacts that "all fines and penalties under the provisions of this Act shall be levied by warrant under the hand of the judge presiding at the Special Court. . . . upon all property belonging to the prisoner at the time of his arrest," and the 57th section forbids any person arrested from alienating any property until the fine, if any should be imposed, is paid or recovered. These sections provided a speedy means of enforcing execution of a rent due for payment of a fine, but they were not intended to deprive the Government of its right by other means to recover the balance of the fine if sufficient has not been levied under the judge's warrant. A fine is one of the remedies provided by the Act for a contravention of the 3rd section, and when a sentence imposing such a fine has been lawfully passed all lawful means of enforcing it remain open to the Government as judgment creditor. Among those lawful means is that of proving the amount of the fine upon the judgment debtor's insolvent estate,

Another question intimately connected with the case has been raised during the argument upon which it would be well for this Court to express its opinion. The question was whether in case the Special Court had imposed an alternative sentence of imprisonment under the 4th section of the Act on non-payment of the fine, the prisoner would have prevented the present proof of debt by electing to go to prison. There can, I think, be no doubt that in such a case his imprisonment, upon non-payment of the fine, would have had the effect of discharging the debt. The accused would, in the absence of express provision to the contrary, have had the option either to pay the fine or serve his full period of imprisonment without payment of any part of the fine. But no such option was given to him in the present case, and the right of the Government to recover payment of the fine by such means as the law affords must be admitted. The claim has been proved as a concurrent and not as a preferent one, and the application for expunging it must be dismissed with costs.

Their lordships concurred.

[Attorneys for the Applicant, Messrs. Fairbridge & Arderne; Attorneys for the Government, Messrs. J. & H. Reid and Nephew; Attorney for the Trustee, Gus. Trollip.]

HEARNshaw V. HEARNshaw. { 1898.
Nov. 28rd.

Mr. Buchanan moved for leave to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce.

Referred to counsel.

ROBICH V. ROBICH.

Mr. Buchanan moved for leave to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce.

Referred to counsel.

SECRETARY FOR WAR V. METRO- { 1898.
POLITAN AND SUBURBAN RAIL- { Nov. 23rd.
WAY AND JOHN WALKER.

Mr. Innes, Q.C. (with whom was Mr. Webber), moved for leave to appeal to Her Majesty the Queen in her Privy Council from the judgment of this Court in the suit between the parties.

Mr. Searle, for the defendants, said there was no objection if the transfer went through and they were not interdicted.

The order was granted on the usual terms.

Ex parte BROWNE.

{ 1898.
Nov. 28rd.

Privileged Will — Executrix — Letters of Administration — Master

B. wrote his will with a lead pencil in his pocket book. The will bore his signature but was not witnessed.

Besides appointing his wife executrix B. gave her a life interest in all his property with remainder to his children.

The Court, following Steer's Executors v. The Master (5 Juta, 313), directed the Master to issue letters of administration to the wife.

This was the petition of Elizabeth Browne, widow of the late William Eaton Browne.

The petitioner's husband died on the 2nd February, 1898. Previous to his death the deceased wrote with a lead pencil in his pocket book what purported to be his last will and testament.

The will was written throughout in the handwriting of the deceased, and bore his signature at the foot, but was not witnessed.

The following are the material portions of the will:

I, William Eaton Browne, leave all my effects, goods, stone and marble business my paintings and etchings, and my share in the Hützeroth Syndicate, to my good loving wife. . . . and I appoint her my sole legatee and executrix.

I also leave the management of my stone and marble business to my son Arthur, and at my wife's death the stone and marble business to become the property of my son Arthur, provided he be willing to keep a home for his younger brothers and sisters.

All my other property, goods, paintings, books, to be equally divided at my wife's death between all my children, and my oldest son, William Browne, of Temple-street, Wolverhampton, England, to share equally with his other brothers and sisters, and I also request my son Walter to assist his mother in carrying out this my last will and testament.

The petitioner applied for letters of administration in terms of the will, but the Master refused to grant them without an order of Court, inasmuch as the will had not been executed in accordance with the Wills Ordinance.

The petitioner now prayed that the Master might be directed to issue to her Letters of administration.

Mr. Watermeyer was heard in support of the application. He relied on *Steer's Case* (5 Juta, 313); *Eaton's Case* (Buch. 75, p. 178); *De Wet's Case* (Buch. 1876, p. 119); (*Voet* (28, 1, 15 and 16); *Van Leeuwen* (Cen. For. III. 2, 20).

The Chief Justice: The Court in *Eaton's* case acted on an exception, which the Court followed with great hesitation in *Steer's* case, but I suppose we are bound to follow that in the present case. Apparently this man intended to make his will, and the whole document is in his handwriting, and is signed by him. We can only do as was done in *Eaton's* case, and authorise the issue of letters of administration to the widow.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Fairbridge & Arderne.]

REGINA V. DOUW WILLEMSE. { 1893.
Nov. 23rd.

Police Offences Act, 1882 — Trespass —
Absence of *mens rea*—Rights under contract—*Bona-fide* dispute as to construction of contract—Ejectment.

The Court, on appeal, quashed the conviction of the appellant for an alleged contravention of the Police Offences Act of 1882, in trespassing on a farm, to the growing crops on which he had certain rights under a written contract with the owner, on the grounds that there was no evidence of mens rea and if that there bona fide dispute as to the construction of the contract the prosecutor should have proceeded by civil action for ejectment.

Appeal from the conviction of the appellant by the Resident Magistrate for Caledon.

The accused was charged with the crime of contravening Act 27 of 1882, section 7, sub-section 12, in that upon or about the 2nd day of November, 1898, and at (or near) Witte Klippias Kloof, in the district of Caledon, the said Douw Willemse did wrongfully and unlawfully trespass on the property of Pieter van der Byl there situated, and did neglect or refuse to leave such property after being warned to do so by the said Van der Byl, or by Pieter Hendrik de Kock authorised by the said Van der Byl.

The accused pleaded not guilty.

It appeared from the evidence that the accused was engaged as a shepherd by Van der Byl under a written contract dated 8th June, 1892, the accused being liable to be dismissed for neglect of duty on receiving one month's notice.

On the 22nd September Van der Byl gave Willemse notice to leave on the 22nd October. On the expiration of the month Willemse, who was in charge of a flock of sheep at an outstation called Witte Klippias Kloof, refused to leave.

Van der Byl then lodged a complaint against the accused at the Resident Magistrate's office for trespassing on his property and refusing to leave his farm or outstation. Van der Byl also instructed the chief constable De Kock to warn the accused to leave the outstation, and should he persist in his refusal to serve a summons on him. De Kock warned the accused to leave the farm, but he refused to do so, assigning as his reason the fact that there was a dispute between himself and Van der Byl with reference to the contract.

Up to the date of the hearing of the case (8th November), the accused still remained in possession of Witte Klippias Kloof.

Under the contract the accused, in consideration of his looking after a flock of sheep not to exceed 1,000, was in lieu of wages to be allowed to sow and cultivate, for his own use and benefit, the sowing lands on the outstation Witte Klippias Kloof, and to keep and graze one team of horses, mules, or oxen for his own use and benefit.

The contract, after providing that Van der Byl should have the right to discharge Willemse with one month's notice, should he fail by neglect or otherwise to fulfil his duty as a shepherd, went on to say in the last paragraph:

After such notice or discharge it will be optional on the appearer of the first part (Van der Byl) to have the standing crops reaped and threshed out, and after deducting the expenses of such reaping and threshing to give to the appearer of the second part (Willemse) in kind or value one half of the proceeds, or to allow the appearer of the second part to reap and thresh out himself and draw one-half of the proceeds reaped.

The accused was found guilty and sentenced to pay a fine of £1, or fourteen day's imprisonment with hard labour.

From this sentence the accused now appealed.

The ground of the appeal was that the defendant was legally on the property in accordance with the contract, and if he were not legally there, he had a *bona-fide* belief that he was entitled to be there, and, therefore, was not wilfully trespassing.

Mr. Benjamin was heard in support of the appeal. He contended that the accused could not be said to have wilfully trespassed, as he had certain rights under the contract which was admittedly in dispute. In any case there was an absence of proof of *mens rea*.

Mr. Giddy for the Crown.

The Court allowed the appeal.

The Chief Justice said: The prosecutor in his evidence treats this case as involving a mere question of master and servant. But the contract put in is a very complicated one. It is not a mere contract of service; it is a contract which involves the letting of certain property and also gives certain special rights to the owner of this property.

Among these special rights the third section of the contract gives the following: "After notice of discharge it will be optional for the appearer of the first part to have the standing crops reaped and threshed, the appearer of the second part to have one-half the proceeds, or if he allow the appearer of the second part to reap and thresh the crop he shall have one half the proceeds." Now it is quite clear from the evidence that there was some dispute about the construction of the contract, but what that particular dispute was is not so clear. A letter is put in on behalf of Mr. Van der Byl, notice is given to Willemsse that Van der Byl will reap and thresh the crops and account for the proceeds. Probably the appellant may have said, "If you are going to reap them let me stay here until the reaping is finished, so that I may have some control." The question is not whether the construction placed upon the contract by the defendant is correct, but whether there was a *bona fide* dispute relating to the contract. If there was such a *bona fide* dispute then this was not a case in which the criminal law should have been put in motion. The accused could not be prosecuted for wilful trespass, because as Mr. Benjamin fairly urged there was no evidence of *mens rea*. The proper cause for Mr. Van der Byl—if there was a *bona fide* dispute—would be to sue the man civilly for ejectment, when the whole question of the contract would be considered. I think that as a criminal prosecution the conviction should be set aside and the appeal allowed.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné.]

HEUGH V. HEUGH { 1898.
Nov. 23rd.

This was an action by edict brought by Mrs. Heugh against her husband, who resided in the Transvaal, and had been personally served with the process, either for divorce by reason of his adultery in the Transvaal, or in the alternative, for judicial separation on the ground of cruelty, and for a division of the property held in community.

Mr. Searle appeared for the plaintiff; defendant in default.

Mr. Searle said the plaintiff had not been able to get evidence with regard to the charge of adultery, therefore the claim would be confined to separation.

Mr. Norman Lacy produced the original certificate of the marriage.

The plaintiff, Louisa Maria Heugh, deposed that she was born at Gomez. They were married at Kimberley on the 24th October, 1887. About 1888 the defendant cruelly ill-treated and beat her. He left in that year for the Transvaal. She

still resided at Kimberley. Her husband was a gentleman's valet before he married her, but had not worked at anything afterwards, and she supported both. He had threatened to shoot her and to put her on a hot stove. After he deserted her she had some correspondence with him.

Mr. Searle read a letter from the defendant to his wife, in which he informed her that her style of composition had too much of Emile Zola about it. He said she had better give up reading such works before her mind got into a state of corruption. If her assertion that she had no ill-feeling against him were true he asked her to prove it by sending him his discharge from the O.M.B. and his papers. He admitted that she had been a good wife, but he did not want to be used merely as a toy, and accused plaintiff of having treated his mother unfairly. He asked, "Are you omnipotent or a goddess, or what are you?" and answered, "You are only a human being like myself." He added that he recognised his errors, and was willing to forgive his wife. He denied the charges of misconduct.

The plaintiff stated that she had never given him cause to complain of her.

The Chief Justice: Is your husband a white man.—No; he is coloured.

Mr. Justice Upington: Have you the Zola correspondence, Mr. Searle?

Mr. Searle: No. (To plaintiff) Do you read the books of Zola?—No, sir.

The Chief Justice: He must have read them.

Plaintiff: I don't know, your lordship.

Did you see him?—No, sir.

Does he read French?—I can't tell, sir.

The Chief Justice: Some of them are translated.

Mr. Searle: I believe they are.

The Chief Justice: You may take a decree *a mensa et thoro* with costs. The Court will order a division of the property held in community, Mr. W. M. Bisset to receive the assets and hand one half over to the defendant, after deducting therefrom the costs of this suit.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

SNYDERS V. THERON. { 1893.
Nov. 23rd.

Sentence and conviction—Appeal—Magistrate's Court Act—Pound Act—Attorney-General—Notice of appeal—Public prosecution—Private prosecution—Costs.

In every case of appeal against a conviction and sentence of a Magistrate's Court the provisions of the 4th section of Act No. 21 of 1876 must be complied with, and if

the appeal is not prosecuted within forty-one days after the giving of notice the right of appeal ceases.

An appeal against a conviction and sentence for a contravention of the 30th section of the Pounds Act (No. 15 of 1892) falls within the provisions of Act No. 21 of 1876, section 4.

Notwithstanding the provisions of Act 21 of 1876 the practice of giving notice of appeal and of the grounds of such appeal, to the Attorney-General, as Public Prosecutor, should be continued in cases where the prosecution has been at the suit of the Crown.

In cases of public prosecution a Magistrate's Court cannot award costs either to or against the accused, and on appeal in such cases it is not the practice of the Supreme Court to award costs.

In cases of private prosecution a Magistrate's Court cannot award costs except where specially authorised thereto, (as for instance under the 74th Rule of the Magistrate's Court Act, 1856), but on appeal in all such cases the Supreme Court may award costs to the successful party.

Appeal from the conviction of the appellant by the R.M. of Sutherland.

The accused was charged with contravening Act 15 of 1892, section 30, in that he did on or about the 22nd July, 1893, at Fortuin, in the district of Sutherland, wrongfully and unlawfully, by force and violent means, release and rescue from and out of the possession, and against the will of Jacobus W. F. Theron, certain 869 head of small stock (sheep and goats), which stock were at the time in the custody of and lawfully seized by the said Theron for the lawful purpose of being impounded.

The accused was found guilty and sentenced to pay a fine of £8, and to pay the costs of the prosecution.

The accused now appealed.

Mr. Searle for the appellant.

Mr. Giddy for the Crown, and

Mr. Graham, for the respondent, took the preliminary objection to the appeal being heard, on the grounds that the notice required by section 4, Act 21 of 1876, had not been given, nor had the appeal been prosecuted within the forty-one days provided for by that section.

Mr. Searle contended that the action was a civil one, in which the Attorney-General had no

interest, and that notice to him was unnecessary. He relied mainly on *Visagie v. Booysse* (Buch., 1869, p. 817).

The Court upheld the exception.

The Chief Justice said: The real questions at issue have been reduced to this: Is the case a civil or a criminal one? I am clearly of opinion that it is a criminal case. The charge against the appellant was that he had rescued animals lawfully seized for the purpose of being impounded. The 30th section of Act 15 of 1892 designates such an act as an "offence," and imposes a penalty of not exceeding ten pounds for each such offence. The 79th section enacts that a sentence of imprisonment with or without hard labour for two months may be imposed in case the penalty be not paid. The 4th section of Act 21 of 1876 gives a right of appeal to any person convicted by the judgment of any Court of Resident Magistrate and sentenced to the payment of any fine, but provides that such appeal shall be prosecuted within forty-one days after giving notice of appeal, and, if not so prosecuted, such conviction and sentence shall become final, and that it shall not be competent thereafter to bring the same before any Superior Court either by appeal or review. No words can be clearer or stronger than these. The appellant was convicted of a contravention of the 30th section of Act 15 of 1892, and he has been sentenced to pay a fine of three pounds. He did not prosecute his appeal within the time fixed and it is no longer competent for him to bring the case before this Court in appeal. An important question has been raised whether in cases of appeal under the Act of 1876 notice of such appeal, and of the grounds on which it is founded, should be given to the Attorney-General. The first section of that Act repeals so much of Act 20 of 1856 as is repugnant to or inconsistent with any of the provisions of the Act of 1876. The 49th section of the Act of 1856 enabled the attorney of a person convicted in a case falling within the class provided by the 47th section to set down the case for argument before the Supreme Court. Without such a provision it would have been impossible to appeal to the Supreme Court in any criminal case, seeing that the 42nd section gave the Magistrates jurisdiction in criminal cases "without appeal or review." But the 4th section of the Act of 1876, by expunging the words "without appeal or review" and laying down a definite mode of procedure in cases of appeal, must be taken to have superseded the mode of procedure directed to be taken in behalf of the convicted person by the 49th section of the Act of 1856. It does not follow that when the prosecution has been at the suit of the Crown an appeal should be allowed without notice to the Attorney-General. As the

public prosecutor he must be considered as officially concerned in every public prosecution, and, quite independently of any express statutory provisions, ought to have an opportunity of being heard in opposition to such appeals. We are of opinion therefore that the practice of giving the Attorney-General notice of appeal and of the grounds of appeal should be continued in cases of appeal against any conviction in a criminal case at the suit of the Crown. In regard to the case of *Visagie v. Booysen* (Buch. 1869, p. 816), which has been cited in support of the view that this is a civil and not a criminal case, I must make two remarks. The first is that that case was decided under the old Pound Ordinance and not under the Act now in force. The second remark is that the arguments of counsel on both sides in that case were based upon the assumption that it ought to be regarded as a civil case, and the question was not raised for the decision of the Court whether it should be otherwise regarded. Both the Ordinance and the present Act award the amount of any fine imposed thereunder to the person proceeding for the same, but the Ordinance makes no provision for the payment by the accused of the costs incurred by a successful prosecutor, whereas the present Act does. In the later case of *Visagie v. Booysen* (2 Roscoe, 48) it was held that the Magistrate could not order the accused to pay the costs, inasmuch as the proceeding was a criminal one. The costs of appeal, however, were allowed to the respondent although the Ordinance does not provide for the payment of such costs. Since that time it has not been unusual in appeals or reviews against convictions in private prosecutions to allow the successful party his costs in appeal. In public prosecutions a different practice has prevailed (*Cornell v. The Queen*, 1 Jut. 46). I may add that under the 78th section of the present Pound Act (No 16 of 1892) the Court may order the costs of appeal to be paid either by the person proceeding for the recovery of the penalty or by the accused person, "the costs to be such as would be allowed if the proceedings were in the nature of a civil action." These words would seem to support the view that in other respects the proceedings are to be regarded as criminal.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. Van Zyl & Buissanin.]

ADMISSION.

Ex parte HUTCHINSON. { 1893.
Nov. 24th.

On the application of Mr. Innes, Q.C., Mr. Edward Oliver Hutchinson was admitted as an attorney and notary, the oaths to be taken before the Resident Magistrate at Bedford.

SHARR AND CO. V. HARBOTTLE, { 1893.
O'BRIEN AND CO. { Nov. 24th

Provisional sentence—Bills of exchange—Counter-claim for damages.

The Court granted provisional sentence on three bills of exchange where the defence set up was a counter-claim for damages against the plaintiffs for alleged breach of contract and for libel.

Prayer for provisional sentence on three bills of exchange, the first for the sum of £848 8s. 7d., with interest from 27th September, 1898, the second for the sum of £66 0s. 6d., with interest from 17th October, 1898, and the third for the sum of £85 13s. 11d., with interest from 31st October, 1898, drawn by the plaintiffs at ninety days' sight in favour of themselves or order, and accepted by the defendants but dishonoured on the due dates.

The bills were drawn in respect of goods bought by the plaintiffs on the indents of the defendants and duly received by the latter.

Mr. Searle, for the defendants, took the preliminary objection that the case could not be heard until the plaintiffs, who reside in England, and who have no immovable property in this country, had given security for costs.

Mr. Rose-Innes, Q.C., for the plaintiffs, submitted that inasmuch as security for the costs of the provisional case had been tendered, that was sufficient.

The Court held that the plaintiffs were bound to give security for the costs of the action on the bills of exchange.

The claim for provisional sentence was then heard. The defence set up was that owing to the failure of the plaintiffs, who were the defendants' general agents, to execute their orders in London, the partnership had to be dissolved.

The defendants alleged that in consequence they had incurred damages to the extent of £500, for which they counter-claimed.

One of the defendants also set up a claim of £1,000 damages, for libel contained in certain letters written by the plaintiffs to the first-named defendant.

The Court granted provisional sentence.

The Chief Justice said: It is not denied that the bills of exchange were drawn upon and accepted by the defendants, and that the goods were actually received by them. But because the plaintiffs refused to supply other goods the defendants now refuse to pay for those they have actually received, and the ground of the refusal is that the plaintiffs have refused to supply more goods. Unless the

defendants can show that there was a contract binding upon the plaintiffs to supply goods I doubt if they can succeed at all on the claim in reconvention. But I am perfectly satisfied that the evidence disclosed in this case affords no defence to the claim for provisional sentence. The other claim in reconvention is for libel contained in a letter. Well, I think it would be extremely difficult to prove publication of the libel, seeing that the person to whom it was addressed showed it of his own accord to his partner and in that way published it. That would not, I think, at least *prima facie*, amount to publication. But it is not necessary for the Court to decide that question now. There is no sufficient evidence before the Court to justify it in refusing provisional sentence. Provisional sentence will therefore be granted, with costs.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. Tredgold, Molayre & Bisset; Defendants' Attorneys, Messrs Fairbridge & Arderne.]

WHEELER V. ASHBURNER.

1893.
Nov. 24th.

Possession—Detention of property—Action on contract—Suing wrong person.

A. and K. lived on a farm, which was leased by the former, and were partners in certain transactions in connection with the farm but not in all matters relating to it.

W. instructed K. to buy some cows for her at a stock sale, and wrote to the auctioneer telling him to debit her with any cows which K. might buy on her behalf.

K. bought a cow and its calf for £8, with which amount W. was debited by the auctioneer.

K. delivered the cow to W., but took the calf to A's farm and kept it there "on the halves" with A.

W. demanded the calf from A., and on the latter's refusal to give it up sued him in the Magistrate's Court for restoration of the calf or for its value £8.

Held, on appeal from the Magistrate's judgment giving absolution from the instance, (1) that the Magistrate's judgment was correct, as it was not clear that the calf was in A.'s possession in the sense that he would have been justified in giving it up without K.'s consent, (2) that the action was on contract, and that there was no evidence of a contract between W and A, and (3) that K. and not A. was the proper person to have been sued.

Appeal from a judgment of the Acting Assistant Resident Magistrate of Somerset West, in an action in which the present appellant sued the respondent, Major-General Ashburner, for the delivery of a certain calf, or its value, £8.

The summons alleged that on or about the 12th day of April, 1893, the plaintiff delivered to the defendant a certain calf of the value of £8, to be safely kept for her, the said plaintiff, until she should require the same. That, though she had frequently demanded the restoration of the said calf, the defendant wrongfully and unlawfully refused to restore the same as requested.

The prayer was for the restoration of the calf or its value.

The defendant pleaded the general issue.

The following facts were proved at the trial: The defendant is the lessee of Knoor Hoek, about a mile from Sir Lowry's Pass, and one Kotzee lives with him but does not pay rent. Defendant and Kotzee are partners in regard to certain transactions in connection with the farm, but not in all matters relating to it. Generally Kotzee acts as assistant to defendant, who supplies seed and implements, while Kotzee cultivates the land and attends to the grazing of the stock, in consideration of which he shares a portion of the profit.

That in general Kotzee has no direct authority to act for the defendant in the purchase of stock, &c., except when acting under the defendant's instructions. Defendant does not acknowledge Kotzee as his bailiff or manager.

In April, 1893, a sale of cattle took place at Stellenbosch. Defendant and Kotzee attended the sale in company. In proceeding to the sale, defendant and Kotzee called at Wheeler's (plaintiff's) hotel. Kotzee entered the bar, defendant remaining in his cart. A conversation took place between the plaintiff's husband and Kotzee about some milch cows to be offered for sale.

It was agreed between plaintiff's husband and Kotzee that the latter should buy a cow or cows for plaintiff, the price to be paid being left to Kotzee's discretion.

Plaintiff thereafter wrote a letter to the auctioneers asking them to debit her with any cows Kotzee might buy on her behalf. Defendant did not hear the conversation, and gave no direct consent to this arrangement.

At the sale Kotzee bought a cow and its calf for £8, instructing the auctioneers to book both to plaintiff. The cow was delivered to plaintiff in due course, but the calf was conveyed to Knoor Hoek by Kotzee in defendant's cart, and detained there. A dispute took place between Kotzee and plaintiff's husband about the ownership of the calf when defendant and Kotzee arrived at plaintiff's place on their return from the sale.

Kotzee refused to deliver the calf. Plaintiff's husband said he would write to the auctioneers for their account, and if he found that both the cow and calf were knocked down to the plaintiff he would demand the restoration of the calf, but otherwise he had nothing to do with it.

Subsequently plaintiff received the auctioneers' account, in which she was charged £8 for the cow and calf. The plaintiff paid the account, and wrote to defendant claiming the restoration of the calf.

The defendant, on the advice of Kotzee, took no notice of plaintiff's communication.

The calf in question remained running on defendant's farm, and was never delivered up to plaintiff. Eventually plaintiff instituted the present action. The defendant was not aware at the time or subsequently of the actual facts in connection with this transaction, and as found by the Magistrate, was not a consenting party to the tort, if committed.

Plaintiff's husband had previously had business transactions with defendant through Kotzee; these transactions were, however, carried on with the express knowledge or consent of the defendant.

The Magistrate held that the evidence was insufficient to conclusively prove the allegations of the summons, and gave absolution from the instance with costs.

The plaintiff now appealed.

Mr. Searle was heard in support of the appeal and contended that Ashburner and Kotzee were partners, but even if they were not, the former must have known of the transaction between Kotzee and the plaintiff, and that the calf was the plaintiff's property. Under such circumstances he was bound to deliver it up on demand, and judgment should have been given in the plaintiff's favour.

Mr. Graham, for the respondent, was not called upon.

The Court dismissed the appeal.

The Chief Justice, in giving judgment, said: This case has been argued as though it were an action to vindicate the plaintiff's property in a certain calf, inasmuch as it was in the possession of the defendant, and the plaintiff was entitled to recover it. But it is not at all clear that the calf was in the possession of the defendant in the sense that the defendant would be justified in delivering it to the plaintiff without the consent of Kotzee. This is an action upon a contract, and it is alleged in the summons that the plaintiff delivered to the said defendant, General Ashburner, a certain calf, value £1, to be safely kept for her until she required same. There is no evidence whatever of such a contract. It appears that Kotzee was passing the plaintiff's farm on his way to a sale at Stellenbosch, and the plaintiff asked him to

purchase a cow. Kotzee purchased the cow, which had a calf with her, and the plaintiff afterwards paid for the calf as well as for the cow, Kotzee kept the calf on Ashburner's farm, it is said on the halves, by which I understand that Ashburner was entitled to share in any progeny the calf might afterwards have. But these facts do not constitute a contract between the plaintiff and Ashburner. It is a contract between the plaintiff and Kotzee, who was the proper person to be sued for the delivery of the calf, as he was in a position to give the animal up. Under the circumstances, I think the Magistrate was justified in giving absolution from the instance. It is quite possible that the defendant may have known about the transaction; but even supposing that he knew, the mere knowledge would not make him liable. There must be a contract before he can be held liable. Under the circumstances, we must come to the conclusion that the Magistrate was right, and the appeal must therefore be dismissed with costs.

Their lordships concurred.

[Appellant's Attorney, G. Montgomery Walker; Respondent's Attorney, J. Hamilton Walker.]

MADLONGO V. GOVA AND OTHERS. } 1893.
 } Nov. 24th.

Summons—Allegation of lawful occupation
Forcible ejectment from land—Action for
damages—Resident Magistrate—Refusal
to take evidence as to actual occupation.

In an action in a Magistrate's Court for damages for forcible ejectment from land alleged to have been in the lawful occupation of the plaintiff, the Magistrate allowed an objection to a question put to the plaintiff by his agent, as to who was at present in possession of the land, on the grounds that the right of occupation was not alleged in the summons.

Held, on appeal, overruling the Magistrate's decision, and remitting the case to him to be tried on its merits, that it was not necessary to allege the right of occupation in the summons, that the allegation of lawful occupation was sufficient, and that the Magistrate should have allowed evidence of actual occupation.

This case stood over from the 25th May last, for the purpose of getting the Resident Magistrate's judgment and his reasons.

It was an appeal from a decision of the Resident Magistrate of Einguobo, in an action in which the present appellant sued the respondents for £100 damages.

The summons alleged :

1. That the plaintiff was in lawful occupation of certain garden lands or plots, situate in the ward or location over which the defendant, Gova, was headman, and that on or about the 21st day of December, 1892, the defendants wrongfully obstructed him in the use and occupation thereof, inasmuch as they, by threats and violence, prevented him and his people from attending to the growing crops standing thereon, and drove him and his people off the said lands.

2. That on or about the 10th day of November last past, and while in the act of ploughing certain, other portion of the said garden plot or plots as aforesaid, the defendants Jonas and his son Hlakanyana, armed with sticks and assegais, and at the instigation of the defendant Gova, wrongfully obstructed him, the said plaintiff, and by threats and violence compelled him to leave off ploughing and quit the land in question. The plaintiff alleged that he had suffered damage in the sum of £100, for which amount he claimed judgment *with costs*.

The defendants pleaded the general issue. During the hearing of the case the plaintiff's agent asked his client in examination who was now in possession of the lands.

The defendants' attorney objected to the question on the grounds that the right of occupation was not alleged in the summons.

The Court sustained the objection on the grounds that there was no claim to right of occupation of the lands in the summons, and gave absolute from the instance.

The plaintiff now appealed from this decision.

Mr. Graham for the appellant.

The defendants were not represented.

The Court allowed the appeal.

The Chief Justice, in giving judgment, said: The Magistrate clearly was under the impression that it was necessary to allege right of occupation in the summons before the plaintiff could proceed, but there he was wrong. The allegation of lawful occupation was sufficient, and it then lay upon the defendants to justify their action in dispossessing the plaintiff. I do not know what the defence may be on the merits, but the Magistrate ought to have allowed evidence of actual occupation. The appeal must be allowed, with costs, and the case remitted to the Magistrate to be tried on its merits.

Their lordship concurred.

Appellant's Attorneys, Messrs. Fairbridge & Arderne]

BLACKBURN V. STEWART'S
TRUSTEE.

{ 1898.
Nov. 24h

Old scrip—Reconstructed company—Fraud
—Action for refund of purchase price.

This was an action for £1,400, being for a refund of the purchase price of certain shares in the Transvaal Exploration and Land Company sold by the insolvent to the plaintiff after the reconstruction of the company, the shares in question being old scrip and valueless.

The Court ordered notice to be served on Stewart, but he did not appear.

Mr. Searle appeared for the plaintiff. The trustee did not defend the action.

Mr. Alfred L. Blackburn, the plaintiff, deposed that on May 31 he purchased at Cape Town, through Mr. Jansen, a broker, from Mr. Stewart 1,400 shares in the Transvaal Exploration and Land Company. The sale was by broker's note. He paid cash, and the scrip was delivered to him by Mr. Jansen. He had dealt in those shares many years ago. He sent the shares to London, and shortly after purchasing them went to England on June 7. The secretary of the company told him Mr. Stewart was not on the list of shareholders, and that the scrip was worthless. It was issued before the reconstruction of the company, and he pointed out that Mr. Stewart had got new scrip at the time of the reconstruction. A specimen of the genuine scrip was produced.

The Chief Justice asked was it not extraordinary to issue fresh scrip without calling in the old. He could not understand why the company should deliver fresh scrip under those circumstances.

Mr. Searle agreed that it was very extraordinary.

The plaintiff added that the company was reconstructed in 1885.

Mr. Justice Upington said that a very bad habit was arising in this country of confounding scrip with share certificates.

Mr. Johan Jansen deposed that he got the scrip from Stewart, who had the transfer witnessed in the presence of a notary. He had not the slightest idea that it was valueless. These shares had not been much dealt in in the Colony for some considerable time.

Charles Frederick Silberbauer, chief clerk in the Master's Office, Insolvency Branch, produced the original notes taken by the Master of defendant's examination at the third meeting of his creditors on October 27. In that examination he admitted that he sold the shares and had got the money.

The affidavit of the secretary of the company was also read, showing that new scrip had been issued to Stewart on payment of 2s. per share on the old scrip, which had not been returned by Stewart.

The Chief Justice, in giving judgment, said : It is to be hoped that few companies would be guilty of such a course of neglect as the liquidators of this company have been guilty of. The secretary now admits that the old scrip is perfectly valueless, and that new certificates were issued to Mr. Stewart, the defendant in this case, without demanding from him the delivery of the old. In this way they placed it in his power to defraud any purchasers to whom he might choose to deliver the old scrip. As to the defendant himself, this morning when the case was mentioned the Court said they would not proceed with it without giving him an opportunity of being heard. Notice has since been given to him, and he has failed to appear. I can only say that if there ever were a case which ought to be handed over to the Attorney-General for consideration it is the present case. It is quite clear that the plaintiff is entitled to his judgment, and the Court will, therefore, give judgment in his favour with costs.

Plaintiff's Attorneys, Messrs. Fairbridge & Arderne.]

JOHNSON V. MCINTYRE. { 1898.
Nov. 27th.

Marriage — Special licence — Father's and mother's consent—Minor—Fraud—False representation—Decree annulling marriage.

The defendant in collusion with the mother of a minor child fourteen years old obtained from a Resident Magistrate a special licence to marry her, without production of the father's consent, by means of a false representation that she was the child of a deceased man.

The father was not aware of the marriage until some weeks after it had been solemnised by a clergyman upon production of the licence, and as soon as he discovered it he applied for and obtained an interdict for restraining the husband from having access to the child pending an action to set aside the marriage.

Held, in an action brought for this purpose, that as the marriage was by special licence no presumption of notice to the father existed, and that, by reason of the fraud perpetrated upon him, he was entitled to have the marriage set aside as null and void.

This was an action for nullity of marriage instituted by Lilly Maud May Johnson against David James McIntyre.

The declaration alleged that the plaintiff was the minor daughter of Niel Johnson, by whom she was assisted in this action as far as needs be, and was fourteen years of age.

That on the 9th September, 1898, a ceremony of marriage was performed between herself and the defendant in Cape Town.

That at the time the said ceremony was performed she had no wish or desire to marry the defendant, and that she was ignorant of the meaning and effect of the said ceremony, and was induced to consent to take part therein by the fraud, deceit, and duress of the defendant, and one Elizabeth Johnson, the mother of the plaintiff, and the said ceremony was performed without the knowledge and consent of the said Niel Johnson, the father of the plaintiff.

That by reason of the said fraud, deceit, and duress of the said defendant and said Elizabeth Johnson, acting in concert with the said defendant, the said reputed marriage was wholly null and void, *ab initio*, and ought by judgment of this Honourable Court to be so declared.

The prayer was for:

- (a) A decree of nullity of the marriage.
- (b) Alternative relief.
- (c) Costs of suit.

The defendant in his plea said he had practised no deceit, fraud, or duress upon the plaintiff; that the plaintiff desired to be married to him on or before the 9th day of September, and fully understood that she was being married to him upon that day.

He admitted that the marriage was performed without the knowledge or consent of the said Niel Johnson, but he said that he did not know that the said consent was necessary; that he was informed by the said Elizabeth Johnson that the said Niel Johnson was not the plaintiff's father, and that he believed the said statement, and that to his knowledge the said Niel Johnson and Elizabeth Johnson were at the said date living apart, although under the one roof.

Wherefore he prayed that the plaintiff's claim might be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Graham appeared for the plaintiff, and Mr. Searle for the defendant.

Niel Johnson, father of the plaintiff, deposed that he was the keeper of the Flash Lighthouse at Green Point. He had been in the lighthouse service thirty-one years. He knew McIntyre since February. He came to the lighthouse as an assistant. His family consisted of his wife, three daughters (Mrs. Bennett, Mrs. Sleet and Lilly), and three sons, two grown-up and one a child. He did not occupy the same quarters with his wife. They did not get on very well together. She had been

intemperate for some years. McIntyre became friendly with Mrs. Johnson and his family. Katie, his daughter, did not care much about him. McIntyre came up to him one day at the end of February, and asked if he had any objection to his marrying Katie; that he had the mother's consent, and partly the daughter's consent. Plaintiff said she was engaged, but if McIntyre had their consent he might have his. Subsequently, in presence of McIntyre, she said she was afraid of him, and accused him of something, which she afterwards told plaintiff, and she soon afterwards went away. After she left home he had a row with McIntyre and threatened to report him. He put McIntyre out of his quarters one night at twelve o'clock. He thought McIntyre went there to see his wife. He reported defendant to Mr. English, the chief clerk. He often saw his wife in McIntyre's quarters. One night he saw her coming out at ten minutes past twelve. He missed her at seven in the evening, and when he saw her he said "Go back again and make a whole night of it. I will report this to-morrow morning." He was afraid to come down and leave the light lest he might do something wrong. He often saw McIntyre getting hold of the little girl Lilly just as one would with a child. She did not appear to be fond of him. She was a sickly little girl, and had not been very much to school. He had to take her away from school because her mother was hardly ever at home to look after her. She had only been at Miss Poppe's school. She was a very well behaved child, and he always treated her well. He refused an appointment offered to him at Daseen Island lest anything should happen to the little girl's health. He had never spoken to McIntyre to the effect that Lilly was not his child. He did not know anything about the marriage ceremony until the middle of October. They did not ask his consent, and if they had he would not have given it. He did not know anything of letters passing between Lilly and the defendant. None of them came to the light-house. The child was afraid to tell him anything. He saw her crying about this time, and when he asked her what was the matter she turned away. He never thought of such a thing as anything going on between McIntyre and Lilly. On one occasion he saw the child waving her handkerchief at the front door. She was laughing, and her mother was standing beside her patting her on the back. He had not seen his wife since November 2. He served the order of the Court upon her that day, and she immediately went away in a cab.

Cross-examined by Mr. Searle: He used to be at East London in 1879. He never knew a man named Robert May there. There was a fire in the lighthouse, in consequence of which he was

sent to Green Point. He had ceased to cohabit with his wife since 1887.

By the Court: He was married in 1865.

Cross-examination continued: He had several rows with his wife recently, but they never came to blows. He had his meals with his family, his wife serving out the things to them. He never, in the course of a row in McIntyre's presence with his wife, stated that George and Lilly were not his children. His two married daughters were Mrs. Bennett and Mrs. Sleet. The former had come to look after Lilly; before that she was living in town. He always treated his child Lilly with affection. He scolded her mother often for saying anything to her. He knew that McIntyre used to take her out on Sundays. He took her once to Wynberg, and witness told the child not to go again. He did not speak to McIntyre about it as they were not very good friends. If he took the girl out more than once it was on the sly. McIntyre was absent from April to September. He heard in the middle of October that Lilly was married. He could not get anything out of the child. The first time he went to the Magistrate's Court they could not find the papers; on the second occasion he took his daughter in with him, and then they found them. When McIntyre came first they were good friends. He never had a quarrel with his wife as to who was the father of the two younger children.

By the Chief Justice: McIntyre and he relieved each other from sunset till midnight and *vice versa*.

By Mr. Searle: It was against his wish that his daughter married Sleet. He was not much of a man. He said a girl never should marry a man she did not like, but he thought McIntyre a better man than Sleet. He had a better position. Sleet worked at the Railway-station at Prince Albert-road.

Re-examined by Mr. Graham: He was willing that his daughter Katie should marry McIntyre, but that was before she made the complaint of his conduct. When his wife went away the last time she took the little boy with her. His wife's mother's maiden name was Mary May.

By Mr. Searle: Lilly did tell him that she married McIntyre because she was fond of him and loved him.

By the Court: His wife never told him that he was not the father of Lilly. He always considered himself her father, and never told anybody he was not. It was long after Lilly's birth, in 1887, that he ceased cohabiting with his wife.

Annie Bennett deposed that she was the wife of J. D. Bennett and sister of the plaintiff. She lived in the flash lighthouse with her father at present. She had been living in Bloemfontein, and on a holiday visit to the lighthouse in February she

first saw McIntyre. Her sister Kate was not living at home then. She never saw anything between him and Lilly during the time she stopped there. She came down again in July, but McIntyre was gone. She heard nothing about an engagement. Lilly was a childish girl in every way. She was not a woman. She had not been much at school. She never heard that letters had passed between them. She saw once that Lilly had been crying. There was chloroform in the house; she found it recently and had broken the bottle. Her father treated Lilly kindly and was very fond of all of them. Her mother also treated them well. She made inquiries about the marriage. She had used no compulsion in inducing Lilly to bring this action.

Cross-examined: She was a little less than a month at the lighthouse in February. McIntyre came while she was there. Lilly always slept with her mother. She was bright, cheerful, and lively in childish ways.

By the Court: She first heard of the marriage from her father a month after it was performed. She had never before that heard from her mother or her sister that there was an engagement. She was frequently at the lighthouse, and saw her mother at her own house between July and October. The child never told her that she was corresponding with McIntyre. When she found her crying she questioned her, and Lilly said it was because her mother made her write letters, but she did not say to whom they were going. If she had been told that Lilly was engaged she would have told her father that she was far too young.

Catherine Maria Jane Sleet, another sister of the plaintiff, deposed that she resided at Prince Albert, where her husband was a porter at the railway-station. At the beginning of the year she was at the lighthouse, and subsequently went into service at Cole's Café, Sea Point. Her mother sent for her in February and introduced her to McIntyre, who often tried to get her to marry her. She was engaged to be married to her present husband. Her mother wanted her to marry McIntyre, but she would not. Her father did not say anything about it. She was not in the least fond of McIntyre, and her sister Lilly did not appear to be.

(A question with reference to an alleged assault by defendant on the witness was not allowed.)

Examination continued: Her father never ill-treated Lilly. She believed she was afraid of her mother, because whenever she told her to do anything Lilly did it. Lilly knew the reason why she had run away from the lighthouse.

By the Court: Neither her mother nor her sister said a word to her about the marriage.

Mary Louisa Poppe deposed that the plaintiff attended her school at Sea Point for two and a half or three years. She had been absent for six

months; she suffered from asthma. She was a well-behaved child, but not very clever and not particularly advanced for her age. She was very good at spelling. She left school in May. Certain letters put in had been read over to her, and she did not consider Lilly was capable of writing them. A letter, dated August 2, was read: "My dearest Sweetheart,—I received your kind and loving letter, and was glad to hear that you were quite well, as this leaves me at present. My dear, I must tell you how much I enjoyed the butter you sent me, and I must thank you for it. Mother would like to see your brother's photo; she would like to see if he is such a devil as yourself. I must thank you for the poetry you sent me, but I think "Overland" is the best. I don't know what you see in me that you are in such a hurry for the knot to be tied. I think I will close with love and kisses. Good-bye, and God bless you" The girl was not capable of writing such a letter.

Mr. Searle objected to this expression of opinion, but the Court allowed the evidence.

Witness said that the girls wrote letters on slates, and Lilly was not very good. She was frequently absent from school.

Cross-examined by Mr. Searle: I suppose these letters on slates are not love letters?—Oh, dear, no.

What do you take exception to in this letter? What particular expression?—I think the letter is too good for her.

In what way? This is rather a bad letter.—She could not write her school letter on a slate without my assistance. She was not full of fun and life at school, but rather the contrary.

"I received your kind and loving letter." Your letters don't begin like that?—Oh, dear, no. Her letters at school were always of the same sort, such as "I went home, then I went to business, walked down to the beach and gathered shells, and fed my canary." They were always the same.

"I am glad to hear that you are quite well as this leaves me at present."—She could say that.

"My dear, I must tell you how I enjoyed the butter."—That, I think, she could say too. I don't think she could write as she did about the photo.

Or the "devil like yourself." That is not a word used in your establishment?—Oh, dear, no.

"I must thank you for the poetry."—I don't think she could spell poetry.

In further cross-examination witness said the girl would not know what "having the knot tied" meant. Other things in the letter she would not have said unless somebody told her. "Silver Threads Among the Gold" was not taught as part of the curriculum of the establishment.

C. M. Stevens, chief clerk in the Resident Magistrate's Office, Cape Town, produced the original declaration made before Mr. Jones,

A.R.M. When Johnson came to him on the 18th October he could not find the papers, but he found them on the second visit.

B. P. Jones deposed that he was Acting Resident Magistrate in Cape Town in September, and on the 9th the declaration produced was made before him. The three people came together, and he read the declaration over to them. It was not a large room, and they all could hear what he said as he read it over. He was not struck by the appearance of the girl; he thought she looked young. The endorsement that the mother was the widow of Robert May was also read. He should think they would all have heard it. He considered the father to be dead because he was told so.

By the Chief Justice: It was not "the late Robert May" except on the endorsement; elsewhere it was "Robert May."

Examination continued: The woman told him she was a widow. He did not know what her exact words were. McIntyre was present the whole time.

Cross-examined: McIntyre might have heard what the woman said. He satisfied himself that the girl understood what she was signing. The only particulars McIntyre supplied were with regard to himself.

By the Court: He had no reason to suppose anything was wrong. They came to him in the ordinary course. The girl looked young but not too young. It did not strike him as strange that McIntyre spoke of the daughter of Robert May while the mother said the late Robert May. He had the statement on the paper before the endorsement and did not alter it. He had no idea that was not the right name. He did not recollect if he asked the girl's age. It did not strike him that she was a mere child, but that she was sixteen or seventeen. He was aware that he had powers to put any questions he wished under the 8th section of Act 9 of 1882.

Rev. John M. Russell deposed that he was the clergyman of the Scottish Presbyterian Church, Somerset-road. McIntyre and Mrs. Johnson came to him on the 9th September. He had an indistinct remembrance of what took place, but his impression was that they came to arrange for the wedding. The girl was not there then. That was on the morning of the same day they were married. He always asked for particulars to fill in the register, and it must have been then the woman told him she was a widow. She said her daughter was a minor, seventeen years old. He agreed to perform the ceremony if they brought a licence, and they came back and were shown into his room. The girl was sitting there when he entered. He thought her appearance odd. She had on a long dress, and looked as if she might be seventeen. He did not remember distinctly how her hair was done. He asked for the licence, which was pro-

duced, he thought, by McIntyre. He saw that it was properly signed, and considered that he was authorised to go on with the ceremony. He put this declaration to the parties: "I do solemnly declare that I know of no lawful impediment why I, David James McIntyre, may not be joined in matrimony to Lillian May, here present." He repeated that, and she repeated a similar declaration willingly. He saw no appearance whatever of unwillingness. He then put the question, "Do you take David James McIntyre, in the presence of God and before these witnesses, to be your lawful wedded husband, and promise and covenant to be a loving, faithful wife unto him," &c. She hesitated, and her mother, in an explanatory and slightly urging tone, told her to say "I do." Then the girl gave her answer, "I do." He did not like the interruption, but the girl seemed to say it quite seriously, and that was the only occasion which he recollected that the mother took any part. The information contained in the original register must have been got from the parties. He would not have taken the consent from the mother unless she said she was a widow. McIntyre must have been in the room, and he (witness) could not understand his not hearing that. After the ceremony the mother said that the girl would stay with her in the meantime, and not go with McIntyre to the island. She also said it was a great safeguard for girls in this colony to be married. They were all present then: By the time the ceremony was over he felt perplexed. The girl seemed to go through everything required in a placid, mechanical way, and appeared to be wanting in womanly sense. That he felt at the close, not while the ceremony was going on.

Cross-examined by Mr. Searle: It never occurred to him that she did not understand it was a marriage ceremony. It was performed in a solemn and deliberate manner. His son was present as a witness.

By the Court: If his perplexity had occurred before the ceremony instead of afterwards, he could not say what he would have done. Such a thing had never occurred to him. It did not strike him as strange that they came without witnesses. Such things often occurred when people had a licence, and the sexton had frequently to witness marriages. He saw plaintiff in court to-day, but her appearance in a long dress was very different from that which she now presented. She looked sixteen.

The Chief Justice: I don't think it was necessary that you should have done more than you did. They came with a licence.

Witness: I should not have married them if I had known that her real age was fourteen. I don't know whether a clergyman is at liberty to refuse, but I should have done it. If I had understood

the circumstances, I should have considered myself justified in making further inquiries.

Lilly Maud May Johnson, the plaintiff, deposed that she was fourteen. She remembered McIntyre coming to the lighthouse to assist her father. Mrs. Sleet, her sister, who was then unmarried, was there. McIntyre did not pay attention or make love to her. She was not fond of him, but he had kissed her. He never asked her to marry him. He took her twice to Wynberg to Mrs. Hart's. She played with the children among the trees there, and was not with him. McIntyre gave her presents, a workbasket and a sunshade. She did not quarrel with him nor did she grow fond of him. She wrote letters to him on the dictation of her mother and McIntyre had written to her. The letters came to Mrs. Adams. Her mother sat by her and made her write. She did not want to write to him, but her mother threatened to beat her. Some were written at Mrs. Adams's and some at the lighthouse, and her mother addressed them. Her mother read some of the replies to her, and others she put in the fire. She did not tell her father of this letter writing, because she was afraid of her mother's threats. She did not think she ever told McIntyre her age. The first letter she wrote said "I shall miss my sweets and fruit, but don't forget to send me the price of the sweets, my sweetheart." Her mother told her to say that. McIntyre used to give her sweets and fruit at the lighthouse. Her mother told her to write something about a girl at Wynberg. She did not know anything about it. She wrote: "Dear Sweetheart,—Thank you very much for the present you sent me. I did not buy sweets with it, I bought a pair of boots." He never sent her money, and she never went to buy a pair of boots. In the next letter she said she was looking at the flash of the Dassen Island light. She saw it once. Her mother told her to write that. She also wrote in another, "Darling, I am growing old, silver threads among the gold shine upon my brow to-day. Life is fading fast away."

Mr. Graham: A peculiar sentiment for this young girl to utter. More probably it was the mother's.

Examination continued: In another letter she said, "I am glad you sent me the money for the ring. Thanks very much for it. I am going to get your initials put on it." She never got money from him and never got a ring. When she was in the church a ring was put on her finger. She took it off at Mrs. Adams's, and it was given to her mother. She had her photograph taken with McIntyre when he returned from Dassen Island. Her mother took her to Mrs. Adams, dressed her in one of that lady's long dresses, and padded her breasts with two tablecloths. Her hair was hanging down,

By Mr. Justice Upington: Mrs. Adams is a Scotch lady who resides at Mouille Point. Mother always brought the letters from her house. She did not know what the meaning of having the knot tied was. She wrote a letter nearly every week by her mother's directions, except when her mother was ill. Some of the poetry and quotations in the letters were taken by her mother out of a book. After McIntyre came back from the island her mother took her down to Mrs. Adams's where she was dressed in a long cream delaine dress and taken in a cab to the Magistrate's Court. She did not understand the declaration which she signed, as told by her mother, "Lilly May." Then they went to church and were married, and a ring was put on her finger. She would have objected only she knew her mother would give her a thrashing. Her mother said in the cab as they were coming away, "You are married to Mr. McIntyre." She did not tell her father because she was afraid of her mother. She wrote to Mr. McIntyre after she was married, still by her mother's directions, but the postscript in the one produced was in her mother's handwriting. She did not want to marry McIntyre, and had never thought of becoming anybody's wife.

Cross-examined: Defendant used to kiss her and take her out. Her mother was kind to her. She wrote letters to Mrs. Adams, who was in the room sometimes and knew she was writing. McIntyre sent money to take her to the theatre and buy some things. She never got the money, but was taken to the theatre. She wrote all the letters (which were read) because her mother made her. In one she indicated that she was growing taller and said, "So you see they are greasing my feet." She did not know what that meant. She wrote to defendant sympathizing with him on a cut finger he had; and thanked him for money which she said had been spent for medicine and not pleasure, as she was ill. She had had no medicine except some sweet oil her father gave her. She did not know what they were doing at the church till the ring was put on her finger. She did not say when she got into the cab, "Now I have got you fast." In the evening she kissed Mr. Adams, and told him she was married because her mother said so. She told a story in her affidavit when she said she did not know about it till long afterwards. She was quite happy with her father. She did not tell him in the presence of her brother George that she married McIntyre because she loved him.

Arthur Shoyer, photographer, deposed that he took a group, plaintiff and defendant (produced). The girl seemed reluctant to be taken.

For the defence,

David James McIntyre, the defendant, head lighthouse-keeper Dassen Island, deposed that he came down to Cape Town immediately he

heard proceedings had been taken. He would be twenty-six next February. He purchased his discharge from the Navy in 1890. He had been married at Simon's Town, and had obtained a divorce on the ground of his wife's adultery. He made plaintiff's acquaintance in 1898. He was at first good friends with Neil Johnson, but they quarrelled on Johnson saying that he saw his wife come out of defendant's quarters. The elder daughter went away, and he paid attention to Lilly. Before going down to Dassen Island he proposed to her. He spoke to the mother, because on a previous occasion the father called his wife a bad name and said that Lilly was not his child. Lilly said she would marry him, but would wait, and he suggested the end of the year. He made her various presents, and used to kiss her. He wrote regularly to her, sending the letters in envelopes inside her mother's letters, which were addressed to Mrs. Adams because Johnson used to open all the letters. Mrs. Johnson told him that Robert May, of East London, who was since dead, was Lilly's father. He never imagined that her mother was forcing her into an engagement distasteful to her. He received letters and photographs from her. He came up in September on account of a sore throat, and stayed at Mrs. Adams. The marriage was then arranged, Lilly fully consenting, and it was decided that she should not go to live with him for some time longer, the time to be decided by her mother and herself. He did not hear Mrs. Johnson say anything to the magistrate or the clergyman about being a widow. He did not see anything about "Widow May" on the register. After they got into the cab Lilly said, "Now I've got you fast." She raised no objection whatever, and he had no conception that such a case would be made. He believed she had been very fond of him, but some person must have been influencing her against him. He did not practise any deceit, fraud, or duress. He sent £9 to her after marriage. The mother said the girl was over seventeen.

The Chief Justice: And you believed it?—Yes.

Why did you not at once take your wife over to the Island?—Her mother said her health was too delicate.

Cross-examined: Mrs. Johnston was in town to-day. Her address was Sea Point. He had seen her every day, and nearly every evening since he came to town. His first wife was a coloured woman, and the child of the marriage, of which he had been given the custody, was at Simon's Town. He did not tell Lilly anything of that. He wanted to marry Mrs. Sleet, but he had no recollection of any assault outside the lighthouse, and did not know why she had run away. She seemed partly willing to marry him, and said she

would give the other one the slip. He did not know it was because she was afraid of him she went away. He was fond of Lilly from the first day he saw her. It was a case of love at first sight. His proposing to the other sister was a mistake. He thought he was marrying a child of Robert May. He heard Mrs. Johnson say the father was dead. Lilly was not reluctant to be photographed.

Robert Adams and Mrs. M. Adams were examined with reference to plaintiff's visits to their house.

George Johnson, plaintiff's brother, deposed that he heard her say to her father that she married McIntyre because she loved him. His father gave him a 1s. 6d. ball not to tell his mother.

The Court gave judgment for the plaintiff, and ordered the declaration to be amended by substituting the name of the plaintiff's father for that of the plaintiff.

The Chief Justice said: By the common law of this colony, as it stood before the promulgation of the Order in Council of 1889, the father of a minor child who was married without his consent, express or implied, was entitled to have such marriage set aside as null and void. The mother's consent, indeed, was also required, but, in case of a difference of opinion, the father's wish had to prevail. If the father knowing of the intended marriage took no steps to stop it he was deemed to have given a tacit consent to it, and, in the absence of fraud on the part of either or both of the spouses, the publication of banns, which was compulsory, was considered as notice to the father. Even if there was an entire absence of consent, express or implied, before the marriage, his subsequent ratification was sufficient to render the marriage perfectly valid. (*Voet*, 28, 2, 11, 18 and 19.) The question to be determined is whether the effect of the Order in Council and subsequent legislation in this colony has been to deprive the father of the right, under the circumstances disclosed in the present case, to have the marriage of his minor child set aside. As to marriage after publication of banns it is a fair inference from the provisions of the Order in Council, more especially of the 10th section, that the father is in law to be presumed to have had notice of such marriage, and that if he does not object before it is contracted he loses the right thereafter of having it set aside. As to marriages contracted before a magistrate the 8th section of schedule to Act 18 of 1860 requires the publication of certain notices before solemnisation, and the 28th section enacts that after any marriage has been contracted in the manner directed by the 8th section no evidence shall be received to prove the want of consent of any person whose consent is required by law. But the

reasoning that the father must be presumed to have notice of a marriage cannot apply to a marriage by special licence. A special licence dispenses with previous notice to the public, and the magistrate in granting it has to rely upon the declarations made by the intended husband and wife under Act 9 of 1882. If one of them be a minor the licence cannot be granted without the written consent of the parents or guardians, as the case might be, or of the Chief Justice of the Colony. If through the fraud of one or both of the persons intending to marry the magistrate is led to believe that the requisite consent has been given and to issue a licence accordingly, the common law right of the father to have such a clandestine marriage set aside remains, in my opinion, intact. The fact that the mother was a party to such a fraud would not affect the father's right, for, as I have already observed, in case of a difference of opinion, his wish must prevail. What then are the facts of the present case? The defendant in collusion with the child's mother obtained a licence from the Magistrate on the faith of their declaration that the child was the daughter of "the late Robert May." Strangely enough no further inquiries were made by the Magistrate, notwithstanding the childish appearance of the little girl, who was only fourteen years old. The marriage ceremony was performed by the Rev. Mr. Russell upon the production of the licence, but no cohabitation ensued. The husband returned to his duties at Dassen Island and the child returned to her home with her mother. As soon as the father discovered what had taken place he obtained from the Court an interdict restraining access on the defendant's part to the child pending an action to be instituted by him for the annulment of the marriage. The defendant, in explanation of his conduct, now says that he had been told by the mother that the child's father was one Robert May and not her husband, whose name is Niel Johnson. He does not venture to state however that he did not know that the child was born after the mother's marriage to the plaintiff. There is, in my opinion, no pretence for supposing that the girl is not the plaintiff's child or that the defendant believed that she was May's child. A deliberate fraud was perpetrated upon the father, with the connivance of the mother of the minor child, and as there exists no presumption whatever that the father knew of the intended marriage, I am of opinion that he is entitled to succeed in this action. The declaration must, however, be amended in such a way as to make it clear that he is plaintiff himself and not merely assisting his minor child in bringing her action. The present case is a strong one, because the minor child herself objects to the marriage and is a party to

the suit to have it set aside. If, as the declaration alleges, a fraud was committed upon her and she was induced to take part in the ceremony in ignorance of its meaning, and through the deceit and duress of her mother and the defendant, she clearly would be entitled to have the marriage annulled. The evidence shows that she acted throughout at the instigation and under the influence of her mother, but the proof either of fraud or of duress is not so clear that the Court would have been justified, in case both the parents had consented, in setting aside the marriage at the suit of the child. But this question need not be pursued any further, because the Court is of opinion that the plaintiff, as the child's father, is entitled to a decree declaring the marriage null and void with costs of suit.

Mr. Justice Buchanan: I concur in the judgment. No hardship can result in these cases, because where a father unreasonably refuses his consent, the parties can always have redress. They can apply to the Chief Justice to inquire into the matter, and where the marriage is desirable, his consent can be given overruling the father's refusal.

Mr. Justice Upington: I am also of the same opinion. I think it is quite clear that a fraud was perpetrated upon the father. At present I express no opinion as to what the position of the girl was during these proceedings.

[Plaintiff's Attorney, J. Hamilton Walker; Defendant's Attorney, C. C. Silberbauer.]

Ex parte STROBEL. { 1898.
Nov. 27th.

Mr. Molteno moved for an interdict restraining one Rynier van Rooyen from passing transfer of one-thirtieth path of the farm Gransvley, in the district of Kaysna, pending an action to be brought by applicant to have the said land transferred to her husband's estate, by whom the land was bought in 1864, but who did not take transfer.

The Court granted a rule nisi, returnable on the 17th of January.

SUPREME COURT.

Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

DU PLESSIS V. DU PLESSIS. { 1898.
Nov. 28th.

This was an action for restitution of conjugal rights instituted by Mr. A. V. W. du Plessis, of Sutherland, against his wife, on the grounds of her malicious desertion.

The declaration alleged that the parties were married on the 16th December, 1890, by ante-nuptial contract, and that in the month of March following the defendant wrongfully and unlawfully deserted the plaintiff, and refused to return to him.

The prayer was for

- (a) A decree of restitution of conjugal rights.
- (b) Forfeiture of all benefits conferred on the defendant by the ante-nuptial contract.
- (c) Further relief, with costs of suit.

Mr. Searle appeared for the plaintiff; the defendant was in default.

Mr. Abram van Wyk du Plessis, the plaintiff, deposed that he lived at Matjesfontein in the district of Sutherland. He was married on December 16, 1890, and lived afterwards with the defendant on his farm. He entered into a notarial ante-nuptial contract before his marriage. After being married for three months and eight days he had a quarrel with his wife, who left him and went to a farm beyond Calvinia, where she was now living. He had not asked her to come back, but he wanted her to come.

By the Court: He was a widower and she was a widow. He had children by his first wife. Defendant and he had a quarrel about a girl whom his wife adopted and who misconducted herself. He did not want the girl to remain in the house, and his wife left with her. His wife had not written to him, but in a letter she had written to another person she accused him of committing adultery, which was untrue, and gave that as her reason for not coming back.

The witness, on being recalled, denied that he was addicted to drink, as had been stated by his wife in a letter before the Court. He was willing to take his wife back, but not her adopted daughter.

The Chief Justice: The Court will grant a decree; for restitution of conjugal rights. The defendant must be ordered to return to the plaintiff on or before the 15th of January, 1894, failing which, take a rule nisi calling on the defendant to

show cause on the 1st of February why a decree for divorce should not be granted. The plaintiff to offer to provide a suitable conveyance to bring his wife back.

Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

LOUW V. DE VILLIERS. { 1898.
Nov. 28th,
Nov. 29th.

Water—Declaration of rights—Action.

This was an action for a declaration of rights, instituted by Mr. Tobias Johannes Louw against Mr. Jan Daniel de Villiers, both of the Paarl.

The more material paragraphs of the declaration were as follows:

The plaintiff is the owner of a certain piece of ground, with buildings thereon, situated at the Paarl, and being portion originally of the farm called Nantes. The defendant is owner of another piece of ground, with buildings, contiguous to the plaintiff's property, and on the north side of it.

Adjoining the plaintiff's property on the south side are certain two pieces of land, called respectively the Nieuwe Molen and Oude Molen, and a perennial stream of water flows through and over the said pieces of land.

The plaintiff, as proprietor of the said portion of Nantes, is entitled to a reasonable share of water from the said stream, and in terms of certain conditions registered in 1855, both with the plaintiff's title and with the title of the said Nieuwe Molen, it was stipulated that the proprietor of the Nieuwe Molen should be obliged always to keep a certain reservoir which was then placed behind the said mill filled with water out of the said perennial stream, so that the pipes leading away therefrom should always be full of water for the use of the proprietors of that portion of the farm Nantes now owned by the plaintiff.

From the year 1855 until the year 1878 the plaintiff's predecessors in title uninterruptedly conveyed the said reasonable share of water to which they were entitled as aforesaid from the said reservoir by means of a pipe passing over a portion of the Oude Molen, and thence over the plaintiff's land and into his dwelling-house, and such water was for the said period used by the owners of the plaintiff's property.

In the year 1878, one P. A. le Roux, who was then the owner of the property now owned by the defendant, and also of the property now owned by the plaintiff, obtained the consent of the proprietor of Nieuwe Molen and the owner of Oude Molen to remove the said reservoir from its original site, and to construct it at a spot upon the place Nieuwe Molen, much higher up the course of the perennial stream aforesaid.

From the new reservoir so constructed the water, to which the owner of plaintiff's present property was entitled, was by the said Le Roux led in pipes to a spot upon a property now owned by the defendant, and from thence it, together with certain other water, was conducted by a pipe over part of the defendant's present property, and on to a spot upon the boundary between the two pieces of land now owned by the plaintiff and defendant respectively. From the said spot the water was conducted by branch pipes, one portion to the house now owned by the plaintiff and the other portion to the houses upon the property at present owned by the defendant.

Thereafter the said Le Roux ceased to be the owner of the said property now owned by plaintiff; the said property passed through various separate hands until it was transferred into the name of the plaintiff; but from and after the year 1878, and until the 17th April, 1898, all the water referred to in the last paragraph was conveyed through the pipes therein referred to, and the plaintiff and his predecessors in title uninterruptedly used the share of water, to which they were entitled, so conveyed from the perennial stream aforesaid.

On or about the 17th April, 1898, the defendant wrongfully and unlawfully cut the branch pipe aforesaid leading from the boundary of plaintiff's dwelling-house.

By reason of the said wrongful act of the defendant, the plaintiff was deprived of the use of water, to which he was entitled, and sustained damage in the sum of £5 by reason of the leakage of water from the pipe so cut.

The plaintiff claimed:

(a) An order declaring that he was entitled to the free use of the pipe at present existing for the purpose of conveying the water to which he is entitled from the existing reservoir to his house, and interdicting the defendant from interfering with the plaintiff's use of the said pipe for the said purposes; or, in the alternative,

(b) An order that the plaintiff was entitled, with the consent of the owners of Nieuwe Molen and Oude Molen, to construct a reservoir at the site referred to in the conditions annexed to plaintiff's title in lieu of the present reservoir, and to allow the water, to which he is entitled, to flow down the stream aforesaid until it reaches the said reservoir.

(c) Or else an order declaring that the plaintiff was entitled, with the consent of the owners aforesaid, to convey the share of water, to which he is entitled, from the present reservoir by means of pipes over the properties Nieuwe Molen and Oude Molen, and thence on to the plaintiff's property.

(d) Payment of the sum of £5 for damages as aforesaid.

(e) Alternative relief with costs of suit.

For a further count to the declaration the plaintiff said: The drainage and house water from the plaintiff's premises were conveyed by a drain which ran from the said premises down a passage between the plaintiff's dwelling house and certain buildings on the defendant's property, and thence under the public street fronting the plaintiff's house.

The said drainage and house water had been so discharged for a period of more than thirty years, and the said drain had for the whole of the said period been uninterruptedly used by the plaintiff and his predecessors in title, and the plaintiff was of right entitled to discharge the drainage and house water aforesaid along the said drain.

In or about the month of May, 1892, the defendant wrongfully and unlawfully closed the said drain, and prevented the plaintiff's drainage and house water from flowing therein, and he claimed the right to prevent the plaintiff from using the said drain as aforesaid.

The plaintiff claimed:

(a) An order declaring that the plaintiff was entitled to discharge his drainage and house water into the said drain, and interdicting the defendant from obstructing the said drain or interfering with the plaintiff's use of it.

(b) Alternative relief, with costs of suit.

The defendant pleaded *inter alia* that the conditions referred to in the declaration were not registered against the title deeds of any property owned by him, but that they appeared to affect the title deeds of the plaintiff and the proprietor of Nieuwe Molen. He admitted that he had cut the branch pipe, but denied that he had done so wrongfully and unlawfully. He said that after he became the owner of his property, and on or about March, 1892, the plaintiff purchased the land he now owned at public auction; that at the said sale he (the defendant) gave notice that he would only allow the use of the water flowing through the pipes upon his property on sufferance, and that thereafter the plaintiff, who was aware of the said notice, entered into an agreement with him to pay him £1 for the use of the water through the said pipes for a year. The plaintiff paid the said sum, and thereafter, on or about January, 1896, the defendant gave the plaintiff notice that the said use would be discontinued, and, in accordance with the said notice, he thereafter cut the said pipe. He denied that the plaintiff had sustained damage thereby, and said that if he had he (the defendant) was not liable for the same.

In reply to the second count of the declaration, the defendant said that he had never interfered with the flow of the drainage and water-house as above described, and that he was willing that they should continue to flow as heretofore; but he

denied that any servitude such as was claimed by the plaintiff had ever been constituted or now existed.

He said that the said P. A. le Roux owned the properties of both plaintiff and defendant from 1878 existed, a merger thereof took place.

Therefore he prayed that the plaintiff's claim might be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Rose-Innes, Q.C., and Mr. Graham appeared for the plaintiff, and Mr. Searle and Mr. Barber for the defendant.

The Chief Justice suggested some arrangement by which plaintiff would get sufficient water for his purposes.

Mr. Innes said his client was absolutely deprived of water, and would agree to any arrangement giving him a proper supply, but such an arrangement would have to be subject to the consent of the owners of Nieuwe and Oude Molen.

The Chief Justice considered that their position would be unaltered.

Mr. Searle said the only water to which plaintiff was entitled was certain water provided under the transfer deed. That was one hour on Sundays, which he should conserve in some way. The defendant claimed to have a perfectly clear title.

A number of plans, deeds, documents, and correspondence were put in for the plaintiff.

Jacobus Peter de Villiers deposed, in reply to Mr. Innes, that he was the son of Petrus Jacobus de Villiers, P. J. van, who owned the property now owned by his mother, Mrs. Niekerk, and Mr. Blake, Oude Molen and Nieuwe Molen. His grandfather owned the property now owned by Mr. Louw. He lived with his mother and transacted all her business. He was thirty-six, and knew the property all his life. Since 1878 the water was taken from the upper reservoir, and let down in the way in which it was done always, until this year. Before that it went through their yard and down to the plaintiff's house. The plaintiff had no water for his house except what he got from the Sunday water. The pipe from the upper register turns out 20,000 gallons a day, all of which was claimed by the defendant. He and his mother recognised the plaintiff's right to get some water from this source.

Cross-examined by Mr. Searle: He remembered when Plessis owned the property which Louw had now. The Paarl Bank had a bond on the property, but he did not know if the directors cut off the water in 1882. He would be willing to have the Sunday water led across portion of his property to a reservoir on Louw's land.

Johannes Jacobus Blake was examined with reference to the manner in which Le Roux, a former occupier of plaintiff's land, used the water.

He was willing to allow the plaintiff to use the old reservoir, but did not wish that he should use two places.

Peter Combrinck deposed that in June, 1881, he bought from Le Roux the house which Louw occupies. The pipes were laid then as now, and he got the water just as it flowed. Mr. Le Roux wanted to sell him the ground at first with only Sunday water-rights, but he insisted on getting it from the pipe for the supply of the house, and this was agreed to. The water flowed there always as long as he remembered. He was over fifty-one.

By Mr. Searle: Le Roux did not tell him that he had no claim to the water, but might have the use of it for a while. It was not permissive. The water had never been cut off, for his wife never complained of any scarcity for domestic purposes.

Tobias Johannes Louw, the plaintiff, deposed that he resided on his property at the Paarl since February, 1892. He purchased it at a sale, at which there was no notice given him that the property was sold without the water-rights. He first heard of the defendant's claim to cut off the water some weeks after the sale, and he was very astonished. He offered Mr. De Villiers £25 to abandon his claim to the drinking water. With reference to the Sunday water, he would first have to clear all the rubbish out of the sluic; he did not want to be a Sabbath-breaker or to make a slave of anyone on the Sabbath. Apart from the question of the day, the water so stored would not be sufficient or suitable for domestic purposes.

For the defence

Jan Daniel de Villiers, defendant, put in his title deed of the portion of Nantes which he holds. At the sale, when plaintiff bought the property, defendant told those at the sale that the water led by the pipe was only permissive. He arranged to let him have it for a year for £1, and at the expiration of the year, he gave him notice that he could not let him have it any longer. One hour of the full stream on Sunday would last a fortnight if kept in a reservoir.

Peter Abram le Roux, Peter G. du Plessis, Daniel Henry Wahl, and Joshua Perold also gave evidence with respect to the manner in which the property was held and used.

Mr. Innes, Q.C., was heard for the plaintiff, and Mr. Searle for the defendant.

The Chief Justice, in delivering judgment, said: For some years before the year 1855 Mr. P. J. de Villiers was the owner of the farm Nantes, in the village of the Paarl, and on portion of that farm as then constituted was the site of the old mill and of the new mill. The mill was fed by two streams, one of which was called the Bethel Kloof Stream, and another coming from the mountain stream on the left was called the Naptes

Stream. In the year 1856 P. J. de Villiers sold both mills to his son, P. J. de Villiers, and several conditions were inserted in the transfer deed passed in favour of his son by which five distinct and separate servitudes were created in respect of this farm Nantes. The farm was not treated as a whole. The distinct portion of the farm Nantes belonging to P. J. de Villiers was treated upon distinct and separate principles. The erven were entitled to water from a 2 inch pipe. Certain other portions were entitled to six hours' water from the Bethel Kloof stream, on Sundays. The old mill property was entitled to six hours' water from the other stream, and the lower proprietors of Nantes were entitled to the overflow water from the stream; a distillery belonging to one Du Toit de Villiers was entitled to a portion; and there was a provision with regard to the pipe leading the water now in dispute. That stated that any future proprietor of the place Nantes next the old mill shall be obliged to keep the reservoir of water placed behind the said mill filled with water out of the stream, so that the pipes leading away might be filled with water for the use of the proprietor of the Nantes old mill. Such pipes to remain undisturbed while the proprietor of Nantes should have the right to take them up and repair them. The main question in this case is what did this old man mean by "future proprietor of the place Nantes next the old mill." The old mill was a very limited space. No mention is made of the new mill, and it is quite clear that the seller intended particularly to limit the portion of land entitled to the water. Where there is any doubt about the meaning of a clause of this kind we should look at the contemporaneous usage to see how the parties themselves understood it and acted upon it. I think I am right in stating that at that time the old man lived in the plaintiff's house, and that the water was required for that house. It appears that there were some higher houses, which possibly also belonged to the old man at the time. Not a single witness has been called to prove that any portion of the water was used for these higher houses. The only evidence was that of Mr. Blake, which only went back so far as 1872. He stated that the water did not go beyond the house now occupied by the plaintiff. That is the only evidence we have on that point. I am satisfied that if it could have been proved that in the time of the old man, P. J. de Villiers, the higher houses were considered to be entitled to the benefit of the servitude, some evidence would have been given to that effect. I think we ought to give some meaning to the words "Next to the old mill." I am satisfied that the old man meant the house then occupied by himself, because it is a usual course where water is required for the pur-

poses of a habitation to convey it by means of a pipe, but where the water is used for irrigation purposes, then it is not conveyed by a pipe, but in a furrow, as alluded to in the present case. With regard to the other portions of the land, I do not find any limitations such as are found in this particular servitude "next the old mill." That being so, I think the only portion of the land belonging to old P. J. de Villiers which could claim any rights was this portion which now at present belongs to the plaintiff. But it is contended on behalf of the defendant that in the year 1878 Le Roux was the owner both of the land now owned by the plaintiff and of that now owned by the defendant, and that he transferred to Combrinck the property now belonging to the plaintiff, and that special mention is made that the water should be led out by a furrow, and it is stipulated that Combrinck should have only one hour's water from the stream on Sundays. From that fact it is contended that there was no intention of preserving the rights to that particular property in respect to the stream of water, but that P. A. le Roux must be taken as having intended to preserve them. As to the intention of the parties there is a conflict: Le Roux says one thing and Combrinck another. The fact that there is such a conflict shows the necessity for being guided by the terms of the transfer deeds themselves rather than by the memory of witnesses. In my opinion, the effect of the transfer deed is not to deprive the owner of the plaintiff's property of the right distinctly reserved to the property by the original servitude. The servitude was duly registered upon the transfer deed of the servient tenement, and that being so the owner of the dominant tenement, whom, I take to be the plaintiff, is now entitled to that right reserved. I do not think the fact of the limitation of the rights of water from the stream could affect the right of this particular servitude which the Court has considered. If this view is correct the plaintiff, as the owner of the present property, would be entitled under the old conditions of sale to insist upon having the reservoir in the old place, and of leading out the water from there. There is nothing to show that Mr. Blake can insist upon the new reservoir being used by the plaintiff. The agreement between them was not registered, and, so far as at present appears, Mr. Blake cannot insist upon the new reservoir being used instead of the old. In strictness, the plaintiff would be justified in insisting on leading out the water from the old reservoir in the manner in which old P. J. de Villiers led it out, according to the conditions of sale. But I am glad to see that the plaintiff does not wish to adopt what I may call the dog-in-the-

manger policy which the defendant has adopted. At present he is willing to allow the defendant also a share of this water, and as he has stated in the first count of his declaration that he is satisfied to take out the water from the pipe, I think the best course would be to make an order in terms of the first prayer of the declaration. That can only be done by consent of the defendant.

Mr. Searle intimated that the defendant would consent to this.

The Chief Justice: Of course that cannot affect the rights of Mr. Blake. I still regret that the owners of the old and the new mill were not made parties to the case, because then the whole question could be decided, but now this order is only subject to their consent. It does not follow that by this order the owners of the old and new mill are bound to allow this reservoir; that is left undecided. As to the second count of the declaration, it is founded entirely upon prescription. It might be right by way of the natural position of the houses, but that is not the ground of the declaration which is prescription. But there has been a merger; both properties having come into the hands of the same proprietor in the interval. On this count there must be absolution from the instance. With regard to the question of costs, I think the costs should follow the result. It is quite clear from the judgment of the Court that the plaintiff had really very much larger rights than he insisted upon. He might have claimed that the whole water should be taken from the defendant and brought on his property, and that the new reservoir should be removed. He claimed only a portion of the water, and even that little he claimed was taken from him; the pipe was cut and the water allowed to percolate through his foundations in the manner described. The costs in this case and of the interdict should follow the result. Judgment will therefore be given for the plaintiff in terms of claim (a) of the declaration with costs, including that of the interdict; and upon the second count there will be absolution from the instance.

Their lordships concurred.

[Plaintiff's Attorney, C. U. de Villiers; Defendant's Attorneys, Messrs. Scanlen & Syfret]

GREGG V. GREGG. { 1898.
Nov. 29th.

This was an action for divorce instituted by Mr. Robert Verling Seward Gregg, principal tenor in the Lyric Opera Company at present performing in the theatre, Cape Town, against his wife, Margaret Gregg, on the grounds of her adultery with one William Smith.

The declaration alleged that the parties were lawfully married in community of goods in Durban, Natal, on the 30th day of April, 1889.

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That there was one child born of the marriage. That on divers occasions since the date of the aforesaid marriage, but more particularly in the months of September and October, 1898, and in Cape Town, the defendant wrongfully and unlawfully committed adultery with one William Smith.

The plaintiff claimed:

(a) A decree of divorce.

(b) That the defendant be declared to have forfeited all benefits arising from the marriage in community.

(c) Alternative relief, with costs of suit.

Mr. Sheil appeared for the plaintiff. The defendant was in default.

Mr. Robert Verling S. Gregg, the plaintiff deposed that he was a professional singer, performing at present at the Opera House, Cape Town, with the Lyric Opera Company. He was married to defendant at Durban on the 20th of April, 1889, in community of goods. He lived happily with his wife till 1891. There was one child, a girl, of the marriage. He identified the photograph (produced) as that of his wife. In 1891 he had a quarrel with his wife at Kimberley and she assaulted him. In consequence of that they separated and he undertook to allow her £10 per month for her maintenance, which he paid for some time. He had not spoken to her since. She was now in Cape Town, and lived in Strand street with a man named William Smith.

By the Court: The child was in Johannesburg. There was no prayer for its custody, as it was adopted by a Mrs. Galloway after the quarrel. He ceased paying the £10 a month when he found his wife was living with Smith in October, 1891.

By the Court: What is this Smith?—He is a chorister in the Opera Company. He sings in the alto us.

Mrs. Catherine Melville, 19, Strand-street, deposed that Mr. and Mrs. Smith lived in her house in September and October. The last witness was not the Mrs. Smith whom she knew. The photograph produced was that of the lady who passed as Mrs. Smith. They occupied the same bedroom, and passed as man and wife.

By the Chief Justice: I don't know Mr. Gregg. I have never seen him before. I cannot say whether the original of this photograph is his wife.

By Mr. Sheil: I have not asked Mrs. Smith if she was Mrs. Gregg. She did not tell me.

The Chief Justice: Is this a fancy dress in this photograph?

Mr. Justice Buchanan: It is an operatic dress.

Mr. Sheil: Defendant is also a member of the Lyric Opera Company.

Edgar Perkins deposed that he was one of the managers of the Lyric Opera Company, and knew the plaintiff and defendant. Since the

company had been performing in Cape Town he called on Mrs. Gregg. She was living in Strand-street, and he saw her in her bedroom. Smith, who was a member of the company, was there at the time in bed.

By the Court: He had known defendant as Mrs. Gregg. She passed at that house as Mrs. Smith.

A decree of divorce was granted, with forfeiture of all rights under the marriage in community.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne.]

DE BEERS CONSOLIDATED MINES { 1898.
V. L. AND S. A. EXPLORATION COMPANY. { Nov. 29th.
{ Dec. 18th.

Bona fide and *mala fide* possessor—Lessee—Accession to land—Improvements—Ownership—Retention—Compensation—Buildings—Trees—Necessary expenses—Injury to land—Materials annexed to land—Legal hypothec—Damages for injury to soil and for non-repair.

(1) A *bona fide* possessor of land retains his ownership in materials affixed by him to the land until he has parted with the possession. Even after the owner has demanded possession such *bona fide* possessor may retain possession until he is compensated for his improvements to the extent of the enhanced value of the land and, failing payment of such compensation, he may remove the materials if he can do so without serious injury to the land, or he may surrender occupation and recover the compensation by action.

(2) A *mala fide* possessor who has affixed materials to the land, and, before demand made by the owner, has disannexed and removed them, is not deemed to have parted with his ownership in the materials. After demand he has no longer the right to retain the land or remove the materials from the land, nor is he entitled to compensation except for such expenditure as he may have necessarily incurred for the protection or preservation of the land.

If however the rightful owner has stood by and allowed the erection to proceed without notice of his claim the possessor will have the same rights to retention and compensation as a *bona fide* possessor.

(3) In the absence of special agreement, a lessee annexing materials, not being growing trees, to the soil is presumed to do so for the sake of temporary and not perpetual use, and, as between himself and the owner of the land, does not, during his tenancy, lose his ownership in the materials. He may, therefore, before the expiration of his term disannex the materials and remove them from the land, subject to the rights of the owner to be secured against any injury to the land and to prevent any depreciation of his hypothecary rights for unpaid rent. At the expiration of the lease, however, the owner of the land becomes the owner of all materials then remaining annexed and even of materials which having been annexed without his consent have been disannexed but not removed by the lessee.

The lessee has no right of retention after the expiration of his term but may by action recover the value of the bare materials annexed by him with the consent of the owner, the land itself being subject to a legal hypothec for such compensation when duly assessed.

Improvements necessary for the protection or preservation of the land may not be removed even during the term, but, on the other hand, they must be compensated for.

By deed of lease the plaintiffs leased to the defendants a plot of ground for five years at an annual rental, and stipulated that the lessees should not use it for any other purpose than a slaughter-place, with the necessary buildings for the same, and that they should at the expiration of the term surrender the land to the lessors with all buildings and erections thereon in good repair and condition, with a proviso that, if no rent shall be due and unpaid the lessees shall be at liberty during their tenancy to remove all such improvements (save and except boundary fences) as shall be capable of removal without injury to the land itself.

The tenants having erected certain buildings with stone foundations for a butcher's slaughtering-place removed the whole of such buildings, except the foundations, before the expiration of the term.

Held, reversing the decision of the High Court of Griqualand, that the stipulations in favour of the lessors did not deprive the lessees of their common law right to remove the materials during their tenancy, and that if some damage was in fact done to the land by the foundations being left in the soil, the action should have been for damages for not delivering the land in the condition in which it was delivered to the lessees, instead of for damages for not leaving the buildings erected by themselves in good repair and condition.

Appeal from a judgment of the High Court of Griqualand West in an action in which the present respondents (plaintiffs in the Court below) sued the appellants (defendants) for the sum of £1,200 damages by reason (as the summons alleged) that the defendants did, in or about the month of May, 1898, in breach of their agreement with the plaintiffs, remove from a certain plot of ground, known as Plot 956, part of the farm Dorstfontein, the property of the plaintiffs, certain buildings thereon, and fail to deliver up the said plot to the plaintiffs with the buildings thereon in good repair; or, in the alternative, the said sum for damages for the removal aforesaid of the said buildings, the property of the plaintiffs.

The declaration was in the following terms:

1. The plaintiffs are the London and South African Exploration Company (Limited), and the defendants are the De Beers Consolidated Mines (Limited), both incorporated companies, carrying on business in Kimberley.

2. On or about the 9th December, 1888, the plaintiffs let to the defendants and the defendants hired from the plaintiff a certain plot of ground, situated on the farm Dorstfontein, the property of the plaintiffs, in the division of Kimberley, Gr. qualand West, and known as Plot No. 956.

3. At the date of the said lease it was agreed between the plaintiffs and the defendants that at the termination of the said lease the defendants should peaceably and quietly surrender unto the plaintiffs, their successors, or assigns the said plot of ground, with all buildings and erections thereon, in good repair and condition.

4. The said lease terminated on or about the 1st day of May, 1898.

5. In or about the beginning of May, 1898, the defendants, in breach of the said agreement in paragraph 3 hereof referred to, removed from the said plot of ground the buildings thereon to the value of £1,200, and failed to deliver up the said plot to the plaintiffs with the buildings thereon in good repair,

6. Alternatively the plaintiffs say that the defendants on or about the said date, wrongfully and unlawfully removed from the said plot of ground certain property belonging to the plaintiffs, to wit, certain buildings to the value of £1,200, wherefore the plaintiffs claim,

(a) £1,200 as and for damages.

(b) General relief.

(c) Costs of suit.

The defendants in their plea admitted the 1st and 4th paragraphs of the declaration, but denied the 5th and 6th paragraphs.

As to the 2nd and 3rd paragraphs, they admitted that on the 7th December, 1888, the plaintiffs leased to them the piece of ground referred to in the declaration; they said that the said lease was in writing, and for the terms thereof they referred the Court. Save as hereinbefore admitted, they denied the 2nd and 3rd paragraphs of the declaration.

The defendants further said that it was provided in the 4th clause of the said agreement of lease that if at the expiration of the said lease no rent should be due and unpaid by the lessees to the lessors, the said lessees should be at liberty during the tenancy to remove all improvements made on the said land by the said lessees, save and except boundary fences, as could be removed without injury to the land itself.

The defendants said that there was no rent due and unpaid by them to the plaintiffs at any time during the said lease, and that in pursuance of the said agreement they did during their said tenancy remove the buildings referred to in the declaration.

The said buildings were erected by the defendants during their tenancy, and were improvements within the meaning of the 4th clause of the aforesaid agreement of lease and were removed by the defendants, and were capable of removal without injury to the land itself.

Alternatively the defendants said that the buildings referred to in the declaration were erected by them during their said lease, and were removed by them prior to the expiration of the said lease without injury to the land.

The defendants submitted that independently of the terms of the said lease they had a right to remove the said buildings.

They denied that the value of the buildings was £1,200, and prayed that the plaintiffs' claim might be dismissed with costs.

Issue was joined on these pleadings.

It was admitted at the trial that the buildings had been removed prior to the expiration of the lease, that there were no buildings on the land demised at the time the lease was entered into, and that they were erected and removed by the defendants.

The evidence showed that the land was leased exclusively for a kraal and shambles, that a slaughter-house had been erected, and was used as such for some years, and that previous to the termination of the lease the buildings were removed by the defendants, leaving only the foundations of the slaughter-house.

The material portion of clause 4 of the lease, upon which the defendants relied, was in the following terms:

"The lessees. . . will at the expiration or other sooner determination of the said term hereby granted, or of any removal thereof, as the case may be, peaceably and quietly surrender unto the lessors, their successors, or assigns, the said plot of ground, with all buildings and erections thereon in good repair and Condition. Provided always that if no rent shall be due and unpaid the lessees, their successors and assigns, shall be at liberty during their tenancy to remove all such improvements (save and except boundary fences) as shall be capable of removal without injury to the land itself."

Clause 6 of the lease was as follows:

6. That lastly it is hereby agreed between the parties hereto that the lessors except and always reserve out of this demise or any renewal thereof unto themselves their successors and assigns, all minerals and mineral rights, diamonds, and other precious stones in and under the plot of ground hereby demised, and that in case the said plot of ground shall at any time be required for mining purposes the lessors, their successors or assigns, shall have the right to terminate this lease or any renewal thereof on giving six calendar months' notice of their intention so to do to the lessees, their successors or assigns, who agree to peaceably quit and deliver up possession of the said plot of ground to the lessors, their successors or assigns, receiving such reasonable compensation for the permanent buildings and erections thereon from the lessors, their successors or assigns, as may be agreed upon or settled by arbitration.

The learned judges in the Court below held that the defendants were not justified either under the common law or by virtue of the lease in removing the buildings, and gave judgment in favour of the plaintiffs for £500 with costs.

From this judgment the defendant company now appealed.

Mr. Rose-Innes, Q.C. (with him Mr. Solomon, Q.C., and Mr. Webber) was heard in support of the appeal, and after referring to the proviso in clause 4 of the lease, submitted that the matter was to be decided not on the common law, but on the terms of the lease. At the execution of the lease no buildings were on the land. No rent was in arrear at the time of removal (see proviso).

The contract means that all buildings left at the termination of the lease must be left in good

repair, but during the term all improvements which were not incapable of being removed "without injury to the land itself," were removable by the lessees. The real point is what is meant by "injury to the land itself." It cannot mean mere disturbance of the soil, for an improvement which is not fixed to the soil is not an improvement to the soil. The boundary fences are specially excluded. He cited *Barnard v. Colonial Government* (5 Juta, 120).

The Chief Justice: The capability of removal must be the test.

Yes, if we do not remove properly then they should bring an action for damages, provided it was possible to remove without injury. There is no compensation payable, and the Court will incline to favour the lessor. The spirit of the old Roman law was that no one could be enriched at another's expense. This lease really puts the lessees in the same position as the *mala-fide* possessor with regard to *voluptuariae impense*. There is no evidence of damage to the land as pasture land. The maxim *de minimis non curat lex* applies. *Voet* (6, 1, 86); *Digest* (6, 1, 87-88; *Cod* (8, 2, 55).

Fixed buildings could be removed under the common law. *Dig* (6, 1, 27).

The Judge-President has gone on the presumption that the buildings being immovable could not *ipso facto* be removed without injury to the land. If so nothing fixed to the land could be removed. What then is the value of the proviso?

Mr. Searle (with him Mr. Currey) for the respondents: As to the Common Law, the rights of a lessee to remove buildings have never been decided in our Courts. *Barnard's* case is not an authority here: it was a case of a *bona-fide* possessor, who is in an entirely different position from a lessee, the latter is improving another man's property to his knowledge: the *bona-fide* possessor occupies *pro dom'no*. See remarks of Hopley J. in *Lyons & Storr's Trustees vs. London and South African Exploration Company* 6 H.C. p. 228. There was no evidence before the Court in *Barnard's* case as to the nature of the building.

The tenement is clearly *praedium urbanum*; for the purpose to which it is applied must be looked to. (See *Swarts vs. Landmark* (2 Juta, p. 5). If *praedium urbanum* the *Placaat* does not apply: special privileges were given by the *Placaat* to tenements of *praedia rustica*.

Under the common law nothing can be removed even before the expiration of the tenancy, which would cause *detrimentum rei*. See *Voet* (19, 2-4). Nothing masoned in to a building by the tenant during his tenancy can be taken out by him, though anything merely temporarily attached by bolts or "hold fasts" can be taken away. See *Abrahams vs. Isaacs* (5 Juta, p. 183).

The distinction between temporary and permanent structures is recognised in *Cens. For.* (pt. 1, bk. 2, ch. 5, section 10), and was recognised by the Court in *Kimberley Building Society vs. Kimberley Borough* (7 Juts, p. 149). See also *Grotius, Introd.* (2, 10, 6 to 8).

But independently of the common law the case may be decided in favour of respondents upon the terms of the contract.

The contract contemplated the erection of buildings: the ground was previously bare: and the contract stated in specific terms that the buildings were to be delivered up. If all buildings could be removed, provided there was no overdue rent, the wording of clause 4 would have been different and much simpler. We cannot assume that the first portion of the clause was agreed to under an assumption that rent would not be paid as provided, and yet this is what appellant's contention must be. The proviso is intended to confer a privilege in a special case upon the lessee not to sweep away all that had gone before. The improvements which were allowed to be removed must be "*ejusdem generis*" with "boundary fences" temporary tin shanties and the like. It appears from the evidence that temporary iron buildings were also erected and removed without objection from the lessors. But these buildings, as to which the dispute arises, were of the class of "permanent buildings" referred to in clause 6. If appellant's contention be adopted everything could be removed under the proviso: it is difficult to see what could be excluded from the wide definition contended for by appellants. Yet some meaning must be given to the clause. The only suggestion appellants can offer is the example of a "dam" but a dam cannot be "removed" at all in the sense in which fences and structures can be; it can be destroyed, and the nature of the ground altered but the dam in so far as it has changed the character of the tenement cannot be "removed."

The common-sense meaning is that nothing can be removed which has become part of the soil. Whatever accedes to the soil cannot be removed without injury to it. This was the view taken by Laurerco, J. P.

The lessees could certainly not have avoided compensation for these buildings if they had determined the tenancy under section 6, and if compensation had not been by implication excluded by the terms of clause 4 the lessors would have had to pay it.

Mr. Innes, Q. C., in reply: Clause 4 means if any buildings are left on the ground they must be left in good order and not in ruins. The other side must go so far as to say that when once a building is fixed in the ground it cannot be removed. Why then the exception of boundary fences? Whether

a building is to be used permanently or temporarily does not affect the nature of its attachment to the soil. When a building is being built it is usual to build small masonry houses, yet they are only temporary. On the other hand many wooden structures are put up with the intention of being used permanently. A building is either attached or not.

Curia ad vult.

Postea (Dec. 13th.)

The Court delivered judgment, allowing the appeal.

The Chief Justice said: By a deed of lease, dated 7th December, 1888, the London and South African Exploration Company leased to the De Beers Consolidated Mines a plot of bare and uncultivated land for a period of five years, with a right of renewal, at a yearly rent of £120. The following are some of the parts contained in the deed: That the lessees, their successors, or assigns shall, within three months, enclose the plot, and that they will not use it for any other purpose than that of a slaughter-place and kraal, with the necessary buildings for the same; and that they will, at the expiration or sooner determination of the term, surrender the plot to the lessors, with all buildings and erections thereon in good repair and condition. "Provided always that if no rent shall be due and unpaid the lessees, their successors, and assigns shall be at liberty during their tenancy to remove all such improvements (save and except boundary fences) as shall be capable of removal without injury to the land itself." There is a further part or covenant that in case the plot of ground should at any time be required for mining purposes the lessors shall have the right to terminate the lease on giving six months' notice to the lessees, who agree to deliver up possession on receiving compensation for the permanent buildings and erections thereon. It was known at the time of the execution of the deed that the lessees intended to sublet the land to one Grewer for the purpose of a butcher's slaughtering-place. The land was accordingly so sub-let, and Grewer erected on it a brick building, with stone foundations as deep in some parts as 18 inches, and with a cobble-stone pavement, at a cost of £650. After Grewer's death, but before the expiration of the term of five years, his executor removed all the materials except those composing the foundation, which was covered up with soil. The rent was always duly paid, but on the expiration of the term the lessees did not exercise their right of renewal. The lessors thereupon demanded the sum of £1,200 as compensation for the removal of the building materials. The lessees consented to pay compensation for some fences, which they admitted to have been improperly removed, but they

refused to pay for the building on the ground that the proviso which I have quoted authorised them to remove the building. An action having been brought in the High Court of Griqualand against the lessees for £1,200, they pleaded that their sub-lessees had the right under the common law as well as under the provisions of the deed to remove the building before the expiration of the term. Judgment was given against the defendants for the sum of £500, and against this judgment they now appeal. Before considering what special rights, if any, are reserved to the defendants by the deed of lease, it would be well to inquire what rights they would have enjoyed, as against the lessor, if the deed had been silent upon the subject of improvements to be effected and removed before the expiration of the term. Looking back to the very infancy of the Roman law, we find that by the Statute of the Twelve Tables it was enacted that no one is to be compelled to take away the timber of another, which has been made part of his own building, but that he may be made by the action, *de tigno injuncto*, to pay double the value; and under the term *tignum*, or timber, all materials for building were comprehended. But if the building were destroyed from any cause, then the owner of the materials, if he had not already obtained the double value, might reclaim the materials. The object of this enactment was to prevent the necessity of buildings being pulled down, and it certainly does not contain any recognition of the maxim that "everything built on the soil accedes to it." In the time of Gaius, however, this maxim had been generally accepted by Roman lawyers. Where the owner of the soil erected the building, using his own materials for the purpose, no difficulty could arise in the application of the maxim, but where the person who built was not the owner it could not always be applied without some limitations. Either the owner knew or he did not know that the land was not his own. If he knew it he was presumed to have voluntarily parted with the materials; if he did not know it then he was not considered as having parted with the property in the materials, and could reclaim them when the building was destroyed (see *Pinnius ad Inst.* 2, 1, 80). In process of time further limitations were introduced by the operation of another maxim "that no one should gain profit to the detriment and injury of another" (*Digest* 50, 17, 206) where the person seeking the profit has sustained no loss, and the person from whom the profit is sought has incurred no legal obligation. Accordingly, we find it laid down by Paulus that a *bona fide* possessor who has made improvements upon the land of another is entitled to have his expenses recouped, and that even a wrong-doer—a *praedo*, as Paulus calls

him—is entitled to recover to the extent of the actual improvement (*Digest* 5, 8, 88). And in the case of a lessee of a house (who of course knows that he is not the owner), it is laid down by *Labo* that if such lessee has affixed a door or anything else to such house, he may by action compel the owner to allow its removal from the house, provided security *damni infecti* be given that the house will not be in any way injured by the removal, and that it will be restored to exactly the same condition in which it had been before the original alteration (*Digest* 19, 2, 19, sec. 4). The Dutch law, so far as it was not affected by local customs or by special legislation, endeavoured to give effect to both the maxims which I have cited, and the differences which undoubtedly exist among the commentators in regard to several points must be ascribed to the more or less importance which they attached to the one or the other maxim. As to possessors, whether *bona fide* or *mala fide*, I need not repeat the observation made in the cases of *Bellingham v. Blommetje* (4 Buch, 86) and *Barnard v. Colonial Government* (5 Juta, 122). There are few Dutch writers of repute who accept the ancient civil law maxim to the extent of depriving the possessor, whether *bona* or *mala fide*, of his ownership in materials which he has annexed to the land, and which, before demand of possession by the owner, have been disannexed by his own act or by the act of another. The main conflict was upon the questions whether the *mala fide* possessor has the right of retention after demand, and what expenses he may recover from the owner. I am inclined to agree with those writers who regard a *mala fide* possession as being in the nature of spoliation, and who hold that the land should first be restored before any question of compensation can arise. As to the nature of that compensation, the high authority of *Groenewegen* and *Voet* as to the state of the law in their time cannot be gainsaid, but a different conception of the law does appear to have gained ground in the time of *Van der Keessel*, who places the *mala fide* possessor on the same footing as a lessee who has made improvements without the consent of the lessor (*Van der Keessel, Thes.*, 214). In regard to lessees in agriculture, their right to retain occupation of the land until compensated for improvements was asserted by some and denied by other writers, even before the States of Holland and West Friesland expressly legislated on the subject. An interesting discussion on the subject may be found in *Huber's Praelectiones* (19, 2, 7). That the right was often claimed and abused is clear from the preamble to the Placaat of 26th September, 1658. The Placaat expressly forbids such retention, and refers to it as a mere pretext for unlawful occupation. That Placaat, whatever may be said as to

those Placaats on the same subject which preceded it, was certainly intended to apply to all agricultural tenements. The 10th section provides that if, after the expiration of the lease, the owner shall resume possession or let to others, he shall be bound to pay the former lessee or his heirs compensation for such buildings as shall, with the consent of the owner, have been erected on the land as well as for the sown lands, but the lessee is not to remain in occupation after the term under the pretext of having erected buildings or made other improvements; his remedy being by action for compensation, which can only be brought after he has quitted possession. The term used for buildings is "timmeragie" which, as Mr. Justice Hopple correctly suggests, was used in the extended sense in which the term *tignum* had been used in the Roman law. The 11th section enacts that in the valuation shall only be included the bare materials "without sand, lime, or wages," and the use of these words strengthens the view that "timmeragie" included more than the mere timber-work. The same section confers on the lessee, after quitting possession, a tacit hypothec for the value of the materials until compensation is paid. The 12th section enacts that as to buildings erected without the consent of the owner, the lessee must before the expiration of the lease "break them down and remove the materials from the land ('met der daad af te breken en van de grond doen brengen'), on pain that whatever shall after such time be found thereon shall come and remain for the benefit of the owner ('op pene dat al het gene na den voorschreven tijd daarop alsnog gevonden zal worden hetzelfde komen en blijven sel ten behoeve van den Eigenaar')." The 18th section provides that no compensation shall be payable to the lessee for the planting of any trees unless they had been so planted with the authority of the owner, in which case compensation is to be payable for the cost of the trees at the time of planting. The enactment is silent as to the removal of trees before the expiration of the lease, but I take it that the civil law principle would apply that the trees having derived their chief nourishment from the soil belong absolutely to the owner of the soil. The Placaat is silent also on the subject of improvements which were necessary for the protection or preservation of the land. Such improvements cannot, of course, be removed before the expiration of the lease, for the removal would be a direct and permanent injury to the land; but on the other hand, there is ample authority for holding that compensation must be paid for such improvements, whether made by a possessor or lessee, in the same way as if such possessor or lessee had acted as *negotiorum gestor*. The Placaat does not mention urban tenements, but it clearly

was not intended to place agricultural lessees in a better position than urban lessees. Every article of it restricts the ancient common law rights of lessees. In the case of *De Vries v. Alexander* (Foord's Reports, 48), this Court held that the ninth article prohibited lessees in agriculture from subletting without the consent of the owner, although it did not apply to urban lessees, whose rights in this respect must be regulated by the rules of the civil law. This view was also adopted by the Supreme Court of the Orange Free State in *Visser's case* (1 Gregorowski, page 8), and was confirmed by this Court in the subsequent case of *Swarts v. Landmark* (2 Juta, 5). The ninth article had never been accepted in Holland as altering the civil law in regard to the subletting of urban tenements, but it does not follow that some of the other articles may not have been accepted as generally applicable. Some of the later writers, notably *Van der Keessel* (Thes. 218), accept the 10th, 11th, and 12th articles as having been incorporated into the common law of Holland and Friesland relating to landlord and tenant. Their view appears to me to be correct; but even if it were not, I cannot agree with the judges in the Court below in holding that if the Placaat does not apply to urban tenements, lessees thereof would have no right during their tenancy to remove materials affixed by them to the soil. If the Placaat does not apply, their right of removal would be beyond doubt, subject, of course, to the landlord's right to prevent any injury to the soil, or any diminution of his security for rent and damages. *Burge*, in his *Commentaries* (vol. 2, p. 15), correctly says: "Movables affixed to land or buildings acquire the quality of immovable by reason not alone of their being affixed, but of their being affixed with the intention of their permanently remaining." No such intention can be presumed when the person by whom they are affixed has only a temporary interest in the land or house. Movables, therefore, which would be immovable if affixed by the owner, continue movable as between him and the tenant. The civil law and the Codes of Holland and Spain permit the tenant to remove them where it can be effected without material injury to the property. This right could only be effectually exercised during the continuance of the relationship of landlord and tenant. The effect of the Placaat was to vest in the landlord, on the expiration of the lease, the ownership in all materials remaining annexed to the land, and even in materials which having been once annexed without his consent had been disannexed by the lessee, but not removed from the land, reserving to the lessee the right to compensation for the value of materials which he may during

his tenancy have affixed to the land with the consent of the owner. In case of *Trustees of Lyons v. Exploration Company* (6 H.C., 216), the High Court of Griqualand decided that "apart from contract the tenant of a urban tenement is not entitled to claim compensation for improvements at the expiration of his tenancy." With this decision I fully agree, if confined to the case of improvements made without the consent of the landlord. As to improvements made with such consent, the right to compensation of lessees, whether agricultural or urban, before the introduction of special legislation in the Netherlands, is undoubted, and it is only by applying the *Placaat* that lessees of urban tenements can be limited in the amount of compensation to the bare value of materials which they have affixed to the land. I have advisedly refrained from referring to the English law, which, upon questions arising between landlord and tenant, can be of little assistance to our Courts. The interests of the landlord, so far as they do not conflict with the requirements of trade, have always been exceptionally favoured by the common law of England, and the ancient Roman law maxim that "whatever is affixed to the soil accedes thereto" has been accepted without all the qualifications which were admitted by the later civil law. Still, several modifications have been introduced, so much so that *Broom*, in concluding his observations upon the maxim (*Legal Maxims*, page 883), remarks that "a perusal of the preceding pages will sufficiently show that the maxim is held up by our law only to be departed from on account of the acknowledged ill effects which would ensue from too strict an application of it." In the Netherlands the maxim has always been tempered, more or less, by the application of another maxim, "That no one should gain profit to the damage and injury of another." The Dutch law, at all events, gives the tenant an opportunity during his tenancy of preventing the rigid application of the more ancient maxim, and if it deprives him, after the expiration of his term, of the ownership in the materials affixed by him, it allows him to recover the cost of those materials if they had been affixed with the landlord's consent. On the other hand, it safeguards the landlord's interests by giving him the right to an interdict restraining any erection not authorised by the contract of lease, or any other act which would diminish his security for rent, and by reserving his right to damages for any injury done to the land. As to the English law, I ought to have added that in a case like the present it is by no means clear that the buildings having been erected only for the purpose of the sub-lessees' butcher's business, could not have been removed during their tenancy. Upon the disputed questions under consideration we are of opinion

that the law of this colony may be briefly stated as follows: (1) A *bona-fide* possessor retains his ownership in materials affixed by him to the land until he has parted with the possession. Even after the owner has appeared to demand possession, such *bona fide* possessor may retain possession until he is compensated for his improvements to the extent of the enhanced value of the land, and failing payment of such compensation, he may remove the materials if he can do so without serious damage to the land, or he may surrender occupation and recover the compensation by action. (2) A *mala-fide* possessor who has affixed materials to the land, and before demand made by the owner has disannexed and removed them, is not deemed to have parted with his ownership in the materials. After demand, he no longer has the right to retain the land or remove the materials from the land, nor is he entitled to compensation, except for such expenditure as he may have necessarily incurred for the protection or preservation of the land. If, however, the rightful owner has stood by and allowed the erection to proceed without any notice of his own claim, he will not be permitted to avail himself of his fraud, and the possessor, although he may not have believed himself to be the owner, will have the same rights to retention and compensation as the *bona-fide* possessor. (3) In the absence of special agreement, a lessee annexing materials, not being growing trees, to the soil is presumed to do so for the sake of temporary and not perpetual use, and as between himself and the owner of the land does not, during his tenancy, lose his ownership in the materials. He may, before the expiration of his term, disannex the materials and remove them from the land, subject to the rights of the landlord to demand security against any serious damage to the land, and to interdict any depreciation of his tacit hypothec for unpaid rent. At the expiration of the lease, however, the owner of the land becomes the owner of all materials then remaining annexed, and even of materials which, having been annexed without his consent, have been disannexed but not removed by the lessee. The lessee has no right of retention after the expiration of his term, but may by action recover the value of the materials annexed by him with the landlord's consent, and the land becomes subject to a legal hypothec for such compensation when duly assessed. Improvements necessary for the protection or preservation of the land may not be removed even during the tenancy, but, on the other hand, they must be compensated for. It follows that if the lease now in question had been silent as to improvements the defendants could not have been held liable for the value of the buildings or for the cost of replacing them. If

they were liable in damages at all, it was for not restoring the land to the condition in which it was before they erected the buildings. The Court below held that the defendants were bound to deliver the land with the buildings erected by themselves in a proper state of repair, and that the measure of damages for their default is the amount it would cost to place those buildings in such a state of repair. I quite agree that this should be the measure of damages if the covenant to surrender the land "with all erections and buildings thereon in good repair and condition" was intended to deprive them of their common law right during their tenancy to remove materials annexed by themselves, and not required for the preservation or protection of the property. It is by no means clear to me that the covenant must be taken to extend to buildings which the lessees might themselves erect. If at the time of the commencement of the lease there had been any buildings on the land, the covenant to deliver buildings in repair would have been held to refer to such buildings and not to include buildings erected by the lessees during their tenancy. But a bare plot of land was leased, and it is fairly contended for the plaintiffs that if the covenant is to have any force at all it can only refer to the buildings erected by the lessees. On the other hand it is suggested that the plaintiffs, whose chief revenue is derived from the letting of land, simply adopted a form of lease without bearing in mind the condition of the land leased to the defendants. The ordinary rule in this colony for the construction of a covenant to repair is that the buildings must be left in the state of repair in which they were delivered to the lessee. A similar rule appears to obtain in England according to the recent case of *Lister v. Lane* (L.R., 1893, 2 Q.B. 216), in which Lord Esher remarked: "However large the words of a covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant." But assuming that the covenant now in question was intended to include buildings which the lessees might erect it cannot mean more than that they should, if left standing, be delivered in good repair. Certainly more explicit language is required to deprive the defendants of their common law right. The proviso which immediately follows appears to have been introduced with the view of preventing the possibility of too rigid a construction of the covenant. In regard to this proviso it is urged that a house with foundations laid into the soil is not capable of removal without injury to the land, but the existence of such foundations can hardly be the test, seeing that large and substantial buildings are now erected upon a broad base without any foundations

being sunk beneath the surface of the soil. The mere fact that some excavation of the soil would be necessary to remove the foundations is not conclusive, for the exception as to "boundary fences" shows that the parties contemplated some excavation or other disturbance of the soil in removing buildings without injury to the land. It may well be that there are a few improvements which would be incapable of removal without injury to the land, but that is no reason for declining to give effect to the proviso, which only prohibits such removal as is incapable of being effected without such injury. The circumstance that if compensation for permanent buildings and erections must be paid to the lessees in case the lessors should terminate the lease before its expiration by effluxion of time does not affect the lessees' right of removal. Six months' notice of such termination must be given to the lessees, and during the interval their right of removal might be exercised. If the right is not exercised, compensation becomes payable under the contract for the value of the buildings, and not for the more limited amount which would by law be payable at the expiration of the term. In the present case no rent was due and unpaid at the time of the removal of the improvements, those improvements were capable of removal without injury to the land itself, and the removal took place before the expiration of the lease. I am of opinion, therefore, that if, in fact, some trifling damage was done to the land by some foundations being left which were not there before the lease, the plaintiffs' proper remedy is to sue for the damage thus done, the correct measure of damages being what it would cost to replace the land in the condition in which it was before the buildings were erected. But the action, in the form in which it was brought, ought in my opinion to have been dismissed. The Court below properly held that the plot of ground leased was an urban tenement, but, in my opinion, erred in holding that, as lessees of such a tenement, the defendants were not entitled during their tenancy to remove the buildings either under the common law or by virtue of the special provisions of the deed of lease. The appeal must therefore be allowed, with costs in this Court and the Court below, and judgment of absolution from the instance entered. Their lordships concurred.

[Appellants' Attorneys, Messrs. Scanlen and Syfret; Respondents' Attorneys, Messrs. Fairbridge & Arderne.]

CHAPMAN V. TOWN COUNCIL OF { 1893.
PORT ELIZABETH. { Nov. 23th.
Municipal Regulations—*Ultra vires*—Reason-
ableness—Dogs—Nuisance—Rabies.

*The Town Council of P.E. being authorised by
Statute to prevent and abate nuisances and to*

frame all such regulations as may seem meet for the good rule and government of the Municipality, framed a regulation to the effect that, after due notice has been published in a local newspaper, all dogs allowed to be at large should be muzzled, and that any dog found unmuzzled in the public streets may be killed by order of the Council. Rabies having broken out in the town such a notice was duly given, and the plaintiff's dog having been found unmuzzled in the public street was killed by the street-keeper.

Held, in an action for damages for the loss of the dog, that inasmuch as the muzzling of dogs when at large is the only effectual means of preventing so serious a nuisance to life and health as the spread of rabies, the regulation was not ultra vires, and that, as carried out, it was not unreasonable, inasmuch as when the notice was given there was rabies in the town.

Appeal from a judgment of the last Circuit Court held at Port Elizabeth on the 18th September, 1898, on appeal from a judgment of the Resident Magistrate of Port Elizabeth, in an action in which the appellant sued the respondents for the sum of £20 damages.

The summons alleged that on or about the 10th day of July now last past, and at Port Elizabeth, the defendants by their servants wrongfully and unlawfully destroyed a valuable fox terrier bitch, the property of the plaintiff, who sustained damage to the extent of £20, for which he prayed judgment with costs.

The defendants in their plea admitted (1) destroying the dog, but alleged that they were justified in doing so by virtue of a certain Municipal Regulation duly framed and promulgated under the provisions of Act No. 14 of 1868, constituting the town of Port Elizabeth a Municipality, and published in the "Government Gazette" of the 23rd June, 1898, which regulation was put in force to check the spread of that most dreadful disease known as rabies, and also after due notice had been published in a local paper, to wit, the "Port Elizabeth Advertiser."

The defendants further said that the dog so destroyed was found at large in South Union-street, a public street within the limits of the Municipality, and without any muzzle as required by the regulation aforesaid.

2. The defendants further pleaded in case the above plea were overruled, but not otherwise, that the damages claimed were excessive.

8. General issue. Wherefore they prayed that the plaintiff's claim might be dismissed with costs.

The plaintiff admitted the publication of the Regulations put in, and also that the dog was unmuzzled and in the street within the Municipal limits, but said that the regulation was ultra vires the powers conferred by the Act 14 of 1868.

It was proved at the trial that the dog was well bred and was worth at least £20.

The Resident Magistrate gave judgment for the defendants with costs. The learned judge who presided at the Circuit Court upheld the Resident Magistrate's decision, and from the latter judgment the present appeal was brought.

Mr. Rose-Innes, Q.C., was heard in support of the appeal, and contended that the regulation was ultra vires of Act 14 of 1868, section 35, and unreasonable. See *Urnado v. East London Municipality* (2 Saeil, 245). No power was given the Municipality under their Act to destroy property. Their killing the dog amounted to a fine or forfeiture, in addition to any fine which might be imposed under section 39 of the Act, and was both unreasonable and ultra vires.

The following cases were cited and discussed: *Barling v. Town Council of Cape Town* (Buch. 1875, p. 101); *Hall v. The Municipality of Victoria West* (2 Juta, 118), and *Graham's Town Municipality v. Ford & Jeffreys* (3 Mens., 506).

The Attorney-General, Mr. Schreiner, Q.C. (with him Mr. Currey), for the respondents, referred to *Lumley on Bye-Laws*, p. 126.

Mr. Rose-Innes, Q.C., in reply.

The Court dismissed the appeal.

The Chief Justice said: There are two questions to be decided in this case. The first is whether the regulation under which the plaintiff's dog was killed by order of the defendants was ultra vires; and the second is whether the regulation as carried out was reasonable. To determine the first question we can only be guided by the Act (No. 14 of 1868) which constitutes the Municipality. It is to be regretted that owing to the number of Acts from which different Municipalities derive their powers, it is impossible to lay down any general rules as to their powers. The result is that in every case the Court has minutely to scrutinise each Act relied upon and that there is an apparent conflict between the decisions relating to Municipal powers. The 35th section of Act 14 of 1868 confers on the defendants the power, amongst other things, "to prevent and abate nuisances, and generally to devise and carry out all such measures as shall appear to be to the advantage and convenience of the Municipality." The 36th section empowers them "to frame all such Municipal Regulations as may seem meet for the good rule and government of the Municipality."

lity." The regulation now in question is to the effect that after due notice has been published in a local paper all dogs allowed to be at large should be muzzled, and that any dogs found unmuzzled in the public streets may be killed by order of the Council. The object of the regulation was to prevent the spread of rabies which had broken out in the town. That the spread of rabies is a nuisance which ought to be prevented and that the muzzling of dogs allowed at large is the surest means of preventing it does not admit of doubt. It follows that the defendants acted within the letter of the law when for the good rule of the Municipality they framed the regulation in question. I admit, however, that the apparently wide powers delegated to the defendants by the Legislature must be limited by the general scope of Municipal functions, and that a regulation which unreasonably interferes with private rights does not become valid merely because it falls within the letter of some wide and vague enactment. The argument for the plaintiff is that the killing of his dog practically amounted to a fine or forfeiture in addition to any fine which the defendants might lawfully provide for under the 89th section of the Act. The argument would be unanswerable if the mischief which the regulation seeks to remedy were an ordinary one, which could be remedied by the exercise of ordinary powers. The danger of rabies in a dog is not only that it might spread to other dogs and animals, but that a bite might convey the terrible disease of hydrophobia to human beings. It would be unreasonable indeed if a local authority, charged with the duty of preventing nuisances, did not possess the power of adopting the only effectual means for warding off such a threatened scourge. The destruction of one dog might prevent the death of many other dogs and preserve the lives of many of the inhabitants. It is not too much therefore to ask of an inhabitant that at all events while the disease is in the place he shall muzzle his dog when at large, and it is not unreasonable that, after due notice has been given, dogs found unmuzzled should be destroyed. If the notice had in fact been given at a time when there was no necessity for it, there might be some ground for the contention that the regulation had been unreasonably carried out, but seeing that rabies had actually broken out at Port Elizabeth, I am of opinion that the course taken by the defendants was fully justified. The appeal against the judgment of the Circuit Court confirming that of the Magistrate's Court must be dismissed with costs.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinne; Respondents' Attorneys, Messrs. Fairbridge & Ardenne.]

SUPREME COURT.

Before Sir J. H. DE VILLIERS, K.O.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.O.M.G.]

PROVISIONAL ROLL.

LOAN AND MORTGAGE COMPANY { 1898.
V. COWPER. { Nov. 30th.

Mr. Molteno moved for provisional sentence for the sum of £1,478 16s., with interest 8 per cent. per annum from December 31, 1886, less £382 7s. 7d., being the balance due on a mortgage bond of £5,182 2s. 9d.

Granted.

MAHOMET V. ABBA.

Mr. Graham moved for confirmation of the writ of arrest in this matter, a case of debt.

The defendant, who was present, acknowledged the debt and confessed judgment.

MORKEL V. MORKEL.

Mr. Barber applied for a writ of civil imprisonment against defendant.

Granted.

TRUSTEES CHURCH OF SOUTH AFRICA V.
VENTER.

Mr. Maskew moved for provisional sentence for the sum of £750.

Granted.

REHABILITATION.

The following rehabilitation was granted on motion from the Bar: Zacharia Hendrina Maria Turek (surviving spouse of the late Frederick Jacobus A. Turek).

In re UNION BANK IN LIQUIDATION. { 1898.
{ Nov. 30th.

Mr. Innes, Q.C., presented the following report of the official liquidators of the Union Bank, recommending the sanction of the Court to compromises proposed to be affected with Charles T. Vos and L. H. Twentyman.

The official liquidators desire, in presenting this report to your Honourable Court, to be allowed to deal with two matters only, namely, their claim against Mr. Charles Torriano Vos (late director) for damages, which has already been before your Honourable Court by way of motion, and a proposal for compromise by Mr. H. L. Twentyman (a debtor), which has also been before your Honourable Court on a previous occasion.

C. T. Vos.—In view of the remarks which fell from the Court when the motion in the matter was before them, and acting under advice, Mr. Vos was approached through his attorneys with a view of ascertaining whether he was willing to make an offer to settle the liquidator's claim.

There have been considerable negotiations in the matter—the original offer being £2,500—but your liquidators are now in a position to offer the following proposals from Mr. Vos, namely:

1. A cash payment of £4,500.
2. Mr. Vos to relinquish one-half of any refunds which may be made in future on his shares in the Union Bank.
3. If this compromise be accepted by your Honourable Court it shall operate as a bar to any action or suit which may be brought by any shareholders or others, and be a full discharge against all liabilities in respect of his actions as a director of the said bank.

Mr. Vos has submitted to your liquidators a worn statement of his financial position, from which it will be seen that he values his estate at £9,269 7s. 11d., exclusive of any future refunds on his shares in this bank, so that the offer now submitted practically gives the liquidation one-half of his estate.

Copies of this statement and of correspondence between Attorney H. F. Standen and Messrs. J. & H. Reid & Nephew are annexed hereto, as well as a copy of the declaration prepared in connection with the action your liquidators had in view had the present compromise not been offered.

Your liquidators have interviewed those contributors largely interested in the matter, who are resident in Cape Town, most of whom are favourable to the offer being accepted, and in view of the remarks which fell from your Honourable Court when the motion was before them, and of circumstances relating to Mr. Vos's connection with the bank as mentioned in previous reports, they have, after very careful consideration, decided to recommend the offer to your Honourable Court for acceptance.

L. H. Twentyman.—On 8th November, 1892, your liquidators submitted an offer of compromise from this debtor, who at that date owed the bank some £50,176 14s 4d., exclusive of interest on a claim originally £72,828 2s., and offered a payment of £200 in full satisfaction of all claims by the bank. A statement of Twentyman's position was then submitted, and the liquidators recommended that a compromise be effected on the basis of a cash payment of £500. As Mr. Twentyman did not then offer this sum, the proposed compromise fell through. He has since agreed to pay the amount recommended by the liquidators (which has been deposited), and the compromise having

been previously advertised, and no objection raised thereto, your liquidators respectfully request the sanction of your Honourable Court to it.

Dated at Cape Town this 29th day of November, 1893.

G. W. STEYTLER, Secretary,
Colonial Orphan Chamber and Trust Company.

H. GIBSON, Secretary,
South African Association
Official Liquidators.

The Court sanctioned Twentyman's compromise and as to the other ordered the report to be published in the usual way and application to be made to the Court on the 12th proximo, for judgment in terms of the compromise.

WYNBERG MUNICIPALITY V. SEARLE. { 1893.
TARY OF STATE FOR WAR. { Nov. 30th

Mr. Searle moved for an order for the personal attachment of the commanding officer of the Royal Engineers for contempt of this Court in having entirely failed to comply with the order granted on the 18th of May last.

Mr. Innes appeared for the defence.

An affidavit was put in by Mr. Searle from the Inspector of the Wynberg Municipality, stating that he, accompanied by the Mayor of Wynberg, had visited the Wynberg Camp on the 14th instant and had found that no attempt appeared to have been made to carry out the terms of the order granted on the 18th May, namely, an interdict restraining the War Department from discharging any offensive matter into the drains coming down to Wynberg from the military camp, the order to be suspended for four months in order that the War Department might make other arrangements.

Mr. Innes read the affidavit of Colonel Olayton, stating that a drainage scheme had been worked out within a few weeks after the order had been granted, and had been despatched to the War Office for authorisation with a request that instructions might be cabled out in order to comply with the order of the Supreme Court within the time specified. No such instructions had yet arrived.

Mr. Justice Upington: It seems to be the old story. The local military authorities are endeavouring to do their duty, but cannot move the imperturbable authorities at Home.

After argument,

The Chief Justice said: The Court will suspend the operation of the interdict for a further period of four months, the respondent undertaking in the meantime to do everything in his power to abate the nuisance. As to the costs of this application, they ought to be borne by the respondent.

DUNNING V. MELLISH.

{ 1898.
Nov. 80th.

Sale of horses—Latent defect—*Laminitis*—
Action for refund of price.

Absolution from the instance granted in an action for refund of purchase price of two horses warranted sound, but which were bound to be suffering from Laminitis three days after they had been delivered, the evidence not being sufficient to prove that the horses were affected with the disease either at the time of sale or at the time of delivery.

This was an action instituted by Mr. E. H. Dunning, of Johannesburg, against Mr. E. Mellish, of Cape Town, for the refund of the price of a pair of horses purchased from the defendant, and which the plaintiff alleged did not comply with the terms of the contract entered into between the parties.

The declaration alleged that on or about 8rd July, 1898, and at Cape Town, the plaintiff purchased from the defendant a pair of draught horses for the sum of £200, delivery of the said horses to be made and taken at Johannesburg, but the horses to be at seller's risk until so delivered, payment of the purchase price and of railway carriage and expenses to be made by the purchaser upon receiving delivery.

It was specially agreed between the parties at the time of the said purchase and as a condition thereof, that the said horses should be sound in every respect, and the defendant, in consideration of the said purchase price, guaranteed that the said horses would be sound when delivered. The horses were delivered on 8th July, 1898, and the plaintiff thereafter paid £226 to the defendant, being the purchase price of the horses, with railway carriage and expenses.

Thereafter the plaintiff attempted to use the said horses when he discovered that they were not sound, but were suffering from laminitis and rheumatism, which caused them to become lame and unfit for use whenever they were driven more than a short distance.

Thereafter the plaintiff repudiated the purchase and tendered to deliver the horses to the defendant, and claimed back from him the sum of £226, but the defendant refused to take back the horses and to repay the said sum.

The plaintiff alleged that he had been put to great expense in procuring veterinary attendance for the said horses and in keeping them since the date when he discovered that they were unsound, and had otherwise sustained damages by reason of the defendant's breach of contract in the sum of £200.

The plaintiff claimed:

(a) An order compelling the defendant to take back the said horses at Johannesburg, and to repay the plaintiff the sum of £226.

(b) Payment of £200 as damages.

(c) Further relief with cost of suit.

The defendant in his plea denied that at the dates of sale and delivery the horses were unsound or suffered from the diseases mentioned in the declaration, but said that the horses were sound at both of the said dates, and prayed that the plaintiff's claim might be dismissed with costs.

Issue was joined on these pleadings.

Mr. Rose-Innes, Q.C., and Mr. Buchanan appeared for the plaintiff, and Mr. Searle and Mr. Tredgold for the defendant.

Mr. Edwin H. Dunning, the plaintiff, stated that he was a resident of Johannesburg. On the 8rd July last he visited Mr. Mellish in order to look at the pair of horses in dispute. The animals were inspanned to see how they went, and plaintiff was pleased with their action. He told Mr. Mellish that he liked the horses and would not haggle about the price. He stipulated, however, that the horses should be guaranteed sound if he purchased them. Mr. Mellish replied that if the horses were not sound, he could return them. Plaintiff then asked the price, and Mr. Mellish replied £200. Plaintiff replied that as long as the horses were perfectly sound, he was quite willing to pay that amount. It was then arranged that plaintiff should purchase the horses, that Mr. Mellish should send them to Johannesburg and that plaintiff should take delivery there. Plaintiff paid the expense of sending the horses to Johannesburg, and Mr. Mellish sent his groom to accompany them. The horses were dispatched on the 4th July and plaintiff left Cape Town for the Rand about the same time, arriving there shortly before the horses. Plaintiff sent his groom to the station at Johannesburg to fetch the horses on the 8th July. They were taken to plaintiff's stable and remained there until the 10th, when they were inspanned and driven from one and a half to two miles. On the following day they were inspanned again and driven to Rietfontein, some six or seven miles. The road was one of the best in the locality. Plaintiff and his groom were in the cart at the time. Going to Rietfontein one of the horses showed signs of being tender in his front feet when any hard substance was encountered. At Rietfontein the horses were outspanned for several hours. On returning to Johannesburg, both horses went very badly. On the morning of the 12th neither horse could lie down. They seemed to be in terrible pain. Their entire bodies were nervously convulsed, and their front legs were very stiff. They could not move without assistance. Plaintiff sent

for Mr. Baker, who was considered to be one of the best veterinary surgeons on the Rand. Mr. Baker stated that the horses were suffering from rheumatism and laminitis. The feet of the horse were unshod, and remained so for about a fortnight, when they were re-shod and driven out again. This time they went worse than before, and he communicated with Mr. Mellish, through his solicitors. He had not used the horses since. He had paid Mr. Mellish £226 for the horses, and the expenses of their journey to Johannesburg, and they had cost him since fully another £100.

By Mr. Searle: He acknowledged receiving the horses at Johannesburg, as he considered, in good condition:

Re-examined by Mr. Innes: His own groom travelled in the same train as the horses, but did not attend to them. Mr. Mellish's groom saw to that.

The evidence of a number of witnesses taken on commission at Johannesburg, including that of plaintiff's groom, several veterinary surgeons, and others, was then read. The evidence of Mr. Geo. Chas. Baker, veterinary surgeon, showed that the horses were permanently injured. The feet of the horses, as he found them on the 12th July, could not have come into the condition they were within four or five days, nor within four or five months. The horses were suffering from laminitis, and the attack they had at Johannesburg must have been a relapse. Laminitis was incurable. His opinion was that the horses were unsound when they were bought, and for some months before.

The other evidence taken on commission was mainly of a corroborative nature, though one witness said it was possible for the disease to arise in a few hours.

For the defence,

Dr. Duncan Hutcheon, Colonial Veterinary Surgeon, stated that he had a special knowledge of the horses in question. He had known one (the blue roan) since it was a year old. It was now four years old. He had known the other (the red roan) since the Port Elizabeth show in April last. He had examined both the horses at the Port Elizabeth show and they were both sound then. He also saw the horses a few days before they were sent to Johannesburg, and he was certain they were not then suffering from laminitis. In his opinion the fact of the horses falling ill within a few days of their arrival at Johannesburg was quite consistent with their being sound when delivered. The horses had been highly fed, and were not in a condition to be driven any considerable distance. Five or ten miles would mean to horses in their condition as much as thirty, forty, or fifty miles to horses in good training.

By Mr. Innes: A horse could be predisposed to laminitis. He would call such a horse sound, however. He thought it was heavy work for the horses to be driven fourteen miles so soon after their arrival at Johannesburg. The plaintiff, when he discovered the horses were lame, ought not to have driven them further. He did not think the laminitis arose from the shoeing. He did not see the horses after they had been shod before they were despatched to Johannesburg.

By the Court: He believed that the laminitis was induced in the horses by the way in which they were treated immediately after their arrival at Johannesburg.

On resuming in the afternoon, Mr. Hutcheon was recalled.

By the Court: Laminitis would show itself within an hour or two after the originating cause. If that cause occurred during the journey to Johannesburg, the disease would have shown itself as soon as the horses took exercise.

Edward Henry Frederick Mellish, the defendant, stated that on the 8th July, he, his driver, Mr. Dunning, and Mr. Ross drove out in the cart with the two horses referred to. They had intended to proceed to Wynburg, but when they had reached Roodebloem, Mr. Dunning declared himself satisfied. The horses were shod on the following morning, and were despatched to Johannesburg on the evening of that day. They were shod by a farrier in his employ named Bemister. Bemister was a thoroughly competent man or he would not have been in his service. A Malay who had been in his employ nineteen or twenty years, named Abdullah, accompanied the horses to Johannesburg. He had never known the horses to be lame at any time.

By Mr. Innes: The sire of both horses was Wanguree. This horse had never had anything the matter with his feet. The horses were sent to Johannesburg in a first-class horse box. The floor was besprinkled with sawdust, and he sent enough fodder to last the journey.

Arthur Herbert Harter, Goods Superintendent at the Cape Town Station, said he remembered the horses being sent up. They were sent in the best truck the Railway Department had.

Abdullah said he knew the horses, which he took to Johannesburg for Mr. Mellish, since they were born. They had never been lame since he had known them. He was in the horse-box during the entire journey to Johannesburg, and looked after the horses properly the whole way.

Edward James Bemister said he had been close on a year in the employ of Mr. Mellish as a farrier. During that time he had shod all Mr. Mellish's horses. He had been a farrier since 1866. He had

shod the horses in question repeatedly to be sent to shows. They were the soundest pair of horses he had ever had to do with.

By Mr. Innes : He pared the hoofs of the horses down when they were shod before sending them to Johannesburg. The horses went away quite lively after they were shod. If they had been pricked they would have shown it at once.

Robert Crawford, also in the employ of Mr. Mellish, gave corroborative evidence.

William Blake, foreman, in Mr. Mellish's service, said he had charge of the stables. The two horses in question were perfectly sound when they were despatched to Johannesburg.

John Conrad Gée said he knew the horses since they were born. He had frequently driven them and had never known either of them to be lame.

Mr. Rose-Innes, Q.C., was heard for the plaintiff, and Mr. Searle for the defendant.

The Chief Justice, in delivering judgment, said : This case has been fairly and very ably argued on both sides. There is no imputation against the good faith of either party, and the only question to be determined is whether at the time these horses were delivered to the plaintiff at Johannesburg they were suffering from such a latent defect as now entitles the plaintiff to recover back the money which he has paid for these horses, and the expenses which he has incurred on their account. Now the experts, who were examined at Johannesburg and who also examined the horses there, explained the disease of the horses, some of them by suggesting that they had already been suffering from chronic laminitis in this colony, which afterwards developed into the acute stage at Johannesburg and others suggesting that the horses had been so badly shod before they were sent up that they afterwards contracted laminitis in consequence. Now, both of these suggestions are in my opinion entirely disproved by the evidence given to-day. Mr. Mellish and all the witnesses called on his behalf satisfy me that the horses have never shown any signs of chronic laminitis so long as they were in this colony. It is admitted on both sides that if these horses had been so suffering they would have shown it by lameness or soreness, and not one of the persons who has been in the habit of daily managing these horses has ever observed any traces of this disease, so that I am satisfied that the suggestion of chronic laminitis in this colony must fall to the ground altogether. The second suggestion is bad shoeing. Now upon this point I quite agree with Dr. Hutocheon, that if bad shoeing had been the cause it would have shown itself before seven days. There was no trace of laminitis for seven days after the shoeing. On the contrary, the horses were perfectly frisky when brought down to the train, and when they left the train at Johannesburg they

were equally frisky, and on the first day that Mr. Dunning used them, on the 10th, the horses showed no signs of laminitis. I am quite satisfied that had shoeing been the cause there would have been traces of laminitis before seven days had elapsed from the shoeing. Now it is suggested to-day in the argument that the disease must have been caused by some injury done to these horses while in the train. Well, it seems to me extremely probable that that may be so, that the train journey may to some extent have contributed to the ultimate development of the disease ; but, though that is probable, it has not been proved. It is equally probable that the horses may have caught a chill after they had left the train, that owing to the exchange from the cramped position in which they were in the truck to the atmosphere of Johannesburg, they might have caught a chill there, and that that chill may have developed into laminitis. It seems to me quite as possible that a chill caught after arriving at Johannesburg may have caused laminitis, as that of chill caught during the journey to Johannesburg may have caused it. It is quite true what has been said about Dr. Hutocheon that he has given his evidence rather as a partisan, and has argued the case rather for the defendant, but that is no reason for dismissing his evidence. I quite accept his evidence on this point that if the cause, the pre-disposing cause, of this disease had originated entirely, and solely during the journey to Johannesburg, it would have shown itself before it did. If that evidence is agreed to I think the plaintiff must be held to have failed to prove that the horses were not delivered in a sound condition on the 8th July, when they were delivered. It is hardly fair to argue that as the horses caught the disease within a short time after delivery that that is sufficient to shift the onus from the plaintiff to the defendant. What is a short time ? If the three days were not sufficient to have developed the laminitis, no doubt that might be so ; but if it is clear from the medical evidence given on both sides that laminitis might have originated within the space of three days, then I do not think the mere fact that the disease originated so shortly after delivery is sufficient entirely to throw the onus on the defendant of disproving the allegation.

It may be a hard case for the plaintiff, but on the other hand, it would have been an equally hard case to decide against the defendant, who believed he was delivering a pair of sound horses, if after the plaintiff had had the horses for a month and he had had no opportunity of seeing how they were treated, he should have been held liable for them—the plaintiff has not proved his case to my satisfaction, and therefore absolution will be granted from the instance with costs.

Their lordships concurred, Mr. Justice Upington saying that he had some suspicion that the disease had been contracted on the railway journey, but that the case could not be decided on mere suspicion.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorney, C. C. de Villiers.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.O.M.G.,
(Chief Justice), Mr. Justice BUCHANAN, and
Mr. Justice UPINGTON]

FESTER V. FESTER. { 1898.
Dec. 1st.

This was an action for divorce, instituted by Peter John Fester against his wife, Magdalena Elizabeth Fester, on the ground of her adultery with one Abdol Magal and others.

The declaration alleged that the parties were married in community of goods at Cape Town on the 81st January, 1887.

That on divers occasions since the date of the marriage the defendant wrongfully and unlawfully committed adultery with one Abdol Magal and others.

The prayer was for:

(a) A decree of divorce.

(b) Forfeiture of the benefits arising from the marriage in community.

(c) Alternative relief with costs of suit.

Mr. Shell appeared for the plaintiff. The defendant appeared in person.

Proof having been given of the marriage,

Peter John Fester, the plaintiff, said he was married to the defendant by Archdeacon Lightfoot, and after his marriage he lived with his wife in Pepper-street for about two years. After the lapse of that time his wife went to a party at Claremont one day accompanied by his sister. The defendant stayed at this party, although requested not to do so by plaintiff's sister, as the company was not good. When defendant returned home she had lost her shawl, and a quarrel ensued between her and plaintiff. She then left him, and went to Stellenbosch. He afterwards heard she was married to Abdol Magal, and on paying a visit personally to Abdol's house he saw his wife there. He had not lived with his wife since this discovery.

By the defendant: He had slapped her occasionally because she went with other men. He had never anything to do with other girls himself. He had never kicked his wife.

The defendant stated that she was now living with her mother, and would never have left the plaintiff had he not ill-treated her.

Plaintiff, in further examination, said that the defendant became a Malay when she married Abdol Magal, but that she became a Christian again when she heard that he (plaintiff) was instituting an action for divorce.

Abdol Magal said he first met Mrs. Foster at the Produce Market, where she supplied him with a cup of tea. He entered into conversation with her, and afterwards presented her with a bouquet. Then he asked her if she had a lover. She replied in the negative, and he asked her if she would marry him. She answered that she had no objection, but that he must ask her parents. He obtained the parents' consent, and promised to marry her if she would become a Malay. She replied that she didn't mind that, and so they were married in August, 1889. About a month afterwards her first husband turned up, but she would not return to him, and continued to live with witness for two years, when she left him and went to live with an Indian. Defendant had a child by witness, but it died.

The defendant interrupted witness several times, and asserted that his statements were not correct.

The Court granted the decree.

[Plaintiff's Attorney, John Ayliiff.]

WHINNEY, N.O. V. GARDINER N.O. { 1898.
Dec. 1st.

Company—Winding-up—Receiver—Official liquidator—Mortgage priority—Debenture-holders—Conflict of jurisdiction—Transaction in one country to be completed in another—Conveyance—Delivery—Registration.

A company registered in England but carrying on a diamond-mining business in this colony executed a deed in England which, after reciting that the company had determined to issue certain debenture stock, to charge the company's mining claims for the due payment of the debentures and interest thereon, to appoint an irrevocable attorney for the purpose of effecting the charge according to the laws of the Colony, and in particular granting a hypothecation of all the mining claims, and a general notarial bond over the property of the company, conveyed all the

assets of the Company to certain trustees for the debenture-holders, with power, in case an order be made by a Court having jurisdiction for the winding-up of the company, to take possession of the property, or appoint a receiver and to enforce the security in any way not prohibited by the law of the Colony by sale of the property.

On the application of the debenture-holders the Court of Chancery in England appointed the applicant as receiver of the property comprised in the deed but made no order for the winding-up of the company.

Thereafter the High Court of Griqualand made an order for the winding-up of the company in this colony and appointed the respondent as official liquidator with full powers under the Act.

The respondent having advertised a sale of the assets of the company in the Colony, the applicant applied to the Griqualand Court (a) for an order recognising him as receiver, with all the powers conferred upon him by the English Court, and (b) for an interdict staying the sale to a date thirteen days later than that fixed by the advertisement.

The High Court having dismissed both applications,

Held, on appeal, (a) that so long as the orders of the High Court for winding-up the company and appointing the respondent as liquidator remained in force that Court was justified in refusing to recognize the applicant's claim to the control and possession of the company's assets in this colony, and (b) that no good reason existed for interfering with the discretion of that Court as to the date to be fixed for the sale of the assets.

The deed (although in form a conveyance of the company's assets) contemplating a completion of the security in this colony, cannot be regarded by the Courts of this colony as a transfer of the ownership of the Colonial assets to the trustees without registration of the mortgage of the mining claims and delivery of the movable assets.

The transaction having been registered in the Deeds Office as a mortgage must be treated as such by the Courts of this colony, and the property mortgaged must be realised and

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distributed by the liquidator of the company (with due regard to the debenture-holders' rights of priority) and not by the receiver appointed in England.

Appeal from an order of the High Court of Griqualand on three applications made in connection with the winding-up of the N.E. Bultfontein Co. (Limited)

The first application was made by Mr. Townshend Griffin as agent in this colony of Mr. Frederick Whinney, the second by the London and South African Exploration Company (Limited), and the third by Whinney as receiver and liquidator of the company.

All the applications practically failed.

The first application was by Whinney's agent praying that the official liquidator of the N.E. Bultfontein Co. should be directed to hand over all the assets of that company to Whinney or his representative on the ground that in his position as receiver appointed by the Chancery Division of the High Court of Justice in England he was entitled to the possession of the assets.

The second application was made on behalf of the L. and S.A. Exploration Company, that the Court should stay the sale of the company's assets until the end of this year, the 31st December, or some other convenient date, so as to enable Mr. Whinney, not in his capacity as receiver but in his capacity as liquidator appointed by the High Court of Justice, England, to come in and deal with the property in that capacity.

The third application was to direct the official liquidator appointed by the High Court of Griqualand, the present respondent, to stay proceedings for a month, or to some other convenient date (the sale of the assets being advertised for the 6th December), so as to enable all parties having claims against the company to bring forward such claims, and have their say in the management of the liquidation, and also to enable capitalists to come in and compete for the purchase of the property.

The High Court made no order on the applications, but gave a direction to the respondent not to sell the assets until 18th December, the official liquidator to have his costs.

From this order the present appellant, who is also the English liquidator and the receiver appointed by the English debenture-holders, in whose favour a debenture trust deed for £50,000 had been passed, now appealed.

The history of the matter was as follows:

The North-East Bultfontein D.M. Company was a company registered in 1889 under a trust deed in England. The head office of the company was in England. All the meetings of the directors

and shareholders were held there. The main body of the shareholders resided there. There was no registration of the company in this country. The company was formed for working certain claims hired from the London and S.A. Exploration Company in the Bultfontein mine at Kimberley. On November 14, 1892, an indenture was entered into whereunder the company conveyed to certain trustees the property of the company on certain trusts, with power to enter upon the property, to sell, and to appoint a receiver under certain conditions. One of those conditions was a winding-up of the company. The company was in want of funds, and it was arranged that a large amount of money should be advanced. It was advanced in the form of debentures. The indenture was not actually registered in this colony until July 12, 1893, when it was registered with a bond for the sum of £50,000. The issue of a larger sum was contemplated, and as a fact, more debentures were issued. The bond, however, was registered in this colony for £50,000 in favour of the trustees of the property of the company, and at the same time as the bond was registered in Kimberley a copy of the deed was registered with it. On the 18th August, in the Chancery Division of the High Court of Justice, Mr. Justice Kekewich made an order at the instance of the debenture-holders, appointing Mr. Whinney the receiver of the property comprised in the indenture, with powers to manage the company's business, but not to act for more than one week without special leave of the Court, and to give security. On the 22nd August, in the High Court of Griqualand an *ex parte* application was made by the Standard Bank, a creditor of the company, for the winding-up of the company, but the Court made no order and directed that notice should be given and they should apply again. On the 24th August, on a further *ex parte* application, the High Court of Griqualand made an order interdicting the company from parting with its assets, excepting for wages, pending the result of an application for the compulsory winding-up of the company. On the 25th August a petition was presented to the Chancery Division of the High Court of Justice in England, at the instance of a creditor of the company for the compulsory winding-up of the company, and this was directed to be heard, in accordance with the practice obtaining in England, before his Lordship, Mr. Justice Vaughan Williams on October 25. On October 30, after the presentation of this petition in the High Court of Justice, Mr. Justice Kekewich made an order upon application that Mr. Whinney be continued as manager of the company until December 31, 1893, and that he should be at liberty to appoint Mr. Griffin manager in Africa of the mines and works of the company the appointment to date from

the 26th August, and that Mr. Griffin be appointed as representing the receiver, he to retain the staff, pay the salaries, and so on. These were the main provisions under which Mr. Griffin was appointed manager in Africa. On August 30, Mr. Whinney despatched a cable message to Mr. Griffin as follows: "Have appointed as our agent yourself to hold assets on behalf of Whinney." On the 31st August the High Court of Griqualand, at the instance of the Standard Bank, made an order for the winding-up of the company, under section 216 of Act 25 of 1892, and appointed Mr. F. J. Gardiner provisional official liquidator. On September 1 this order was telegraphed to London and served on the company. On September 1 Mr. Whinney cabled to Mr. Griffin: "Attend Court on 14th to protect rights of debentures." On September 14 the High Court of Griqualand appointed the respondent in the present appeal (Mr. Gardiner) official liquidator of the company with the usual powers. The next thing happened on September 25, when, at an extraordinary general meeting of the company in London, a resolution was passed: "That it has been proved to the satisfaction of the company that it cannot by reason of its liabilities continue its business, and it is advisable to wind up the same." Mr. Whinney was appointed liquidator under this voluntary winding-up. On October 14 Mr. Whinney cabled to Mr. Griffin: "I appointed the receiver in Chancery, August 18, and liquidator September 25." On October 18 this message was communicated to Mr. Gardiner, the official liquidator in this colony. On October 19 the liquidator (Mr. Gardiner) presented the report to the High Court of Griqualand, and that Court sanctioned the exercise by the liquidator of certain powers, including the power to sell. On October 20, at a general meeting of the company's creditors, summoned by the official liquidator in this country, a resolution was carried: "That in the opinion of the majority of the meeting, the works of the North-Eastern Bultfontein should be carried on until a day on which a meeting should be convened by the liquidator after November 30." On October 23 Mr. Griffin received a notice from Mr. Whinney by letter of the resolution passed in England on September 25. On October 25, in the Chancery Division of the High Court of Justice, His Lordship Mr. Justice Vaughan Williams made an order that voluntary liquidation should be continued under the supervision of the Court. On October 27 Mr. Whinney cabled to Mr. Griffin: "Court ordered provisional winding-up; confirmed me as liquidator." On the same day the liquidator in this country inserted a public notice that the company's property would be sold by public auction on or about December

6. On November 8 the applications referred to came before the High Court of Griqualand to recognise Mr. Whinney as manager and receiver, or at any rate to stay the sale until the rights of the debenture-holders could be decided upon.

Mr. Searle (with him Mr. Webber) was heard in support of the appeal, and contended that the receiver appointed in England should be recognised in this country. In any case the sale of the company's property should be postponed.

He cited and discussed the following cases: *Pound's Case* (43 Ch. Div., 42) *re Commercial Bank of South Australia* (88 Ch. Div., 174); *In re Federal Bank of Australia* (W.L. 18, March, 1898).

Mr. Rose-Innes, Q.C. (with him Mr. Solomon, Q.C.), for the respondent.

The Court dismissed the appeal.

The Chief Justice said: For the purposes of the present appeal the Court must assume that the orders of the High Court winding up the company and appointing an official liquidator, with full powers, were properly made. The company was registered in England but carried on its business of diamond mining in this colony, and there is no appeal against the order for its winding up under the Colonial Act. Among the powers conferred on the liquidator is that of selling the movable and immovable property, effects, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels. The order appointing the respondent as official liquidator with these powers has not been appealed against. It appears that by deed executed in London on the 14th November, 1892, the company conveyed to certain trustees as security for certain debenture stock all its assets and effects, including its mining claims and leases in this colony, upon certain trusts, with power to enforce the security in any way not prohibited by the law of this colony, or to appoint one or more receivers. On the 12th of July, 1893, a bond was passed and registered at Kimberley by the company in favour of the trustees mortgaging the lease of the company's diamond-mining claims as security for the debenture debt of £50,000. On the 18th of August, 1893, the Court in England, on the application of the debenture-holders, appointed the applicant as receiver of the property comprised in the deed, and to manage the business of the company, but not to act as manager for more than one week without the leave of the Court. On the 24th August, 1893, the High Court of Griqualand, on the petition of a Cape creditor, granted an interdict restraining the company from parting with any of its assets within the jurisdiction of that Court, except for payment of current expenses, pending the result

of an application to be made on the 31st of that month for the compulsory winding-up of the company. On the 25th August a petition for the winding-up of the company was presented to the Court in England, and directed to be heard on the 25th October. On the 30th August the English Court ordered that the applicant be continued as manager until 31st December, 1893, or until further order, with liberty to appoint Townshend Griffin manager in Africa of the company's mines and to pay the salaries of the manager and staff of the company. On the 31st August the High Court made an order for the compulsory winding-up of the company, and on the 14th of September appointed the respondent as official liquidator. On the 25th September, 1893, a resolution was passed at a general meeting of the company in London that "it cannot by reason of its liabilities continue its business, and it is advisable to wind up the same," and another resolution was passed that the applicant be appointed liquidator for the purposes of such winding-up. On the 19th October the High Court sanctioned the exercise by the respondent of all the powers contained in section 149 of Act 25 of 1892 other than that of taking criminal proceedings. On the 23rd of October the first of the petitions now under consideration was filed in the Griqualand Court on behalf of the applicant as receiver and manager appointed by the English Court. On the 25th of October the petition of the 25th August was heard in the English Court, which made no order for the compulsory winding-up of the company, but continued the voluntary liquidation under the supervision of the Court. On the 27th of October the respondent gave public notice of his intention to sell the property and assets of the company by public auction on the 6th December, 1893, if not previously disposed of. This notice was advertised in the Cape papers and sent to England for advertisement in certain London newspapers. On the 30th of October the second petition under consideration was filed in the High Court of Griqualand. The first of these petitions prayed for an order recognising the applicant as receiver and manager with all the powers conferred upon him by the English Court, recognising the appointment of Griffin as representative in this colony of the applicant, directing the respondent to deliver possession of the company's assets in this colony, and to render an account of his dealings with such assets, and restraining the respondent from selling any of the assets until the rights of the debenture-holders are declared. The second petition prays that all proceedings in connection with the sale of all or any of the company's assets (except diamonds won for the purpose of paying the expenses of working) be

stayed until the 31st of December, 1898, or further order. Both petitions were heard together on the 3rd of November, 1898, when the High Court directed that any sale of the company's property to be made by the respondent shall be subject to confirmation by the Court and that the property be not sold at an earlier date than Monday, December 18, 1898, and made no further order on the petitions save that the applicants must pay the respondent's costs. Against this judgment the present appeal has been brought. The two questions then to be determined are, *firstly*, Is the English receiver entitled to claim the control and management of the company's assets in the Colony as against the official liquidator duly appointed by the Colonial Court? And *secondly*, assuming that the right to such control and management is with the respondent, ought the High Court to have restrained him from selling the assets before the 31st December, 1898? For the purpose of answering the first question it would be a fruitless task to inquire whether in strict law the company's domicile is in England or in this colony. It is not denied on the applicant's behalf that the company was amenable to the process of our Courts, at all events in respect of debts contracted and assets situated in this colony. If the deed executed in England was intended to have the wide effect contended for of transferring all the company's assets in this colony to the English trustees, this Court is not bound to allow that wide effect to it. As to the claim property, the effect of local legislation in Griqualand West has been to place it on the same footing as immovable property, and it is therefore unnecessary to inquire whether an ordinary lease confers such a *jus in re* as is capable of being classed amongst immovables. (See *Green v. Griffiths*, 4 Juta, 350.) The assets of the company mainly consist of mining claims, but even as to the movables a voluntary conveyance made in England with the view of being completed in this colony would not have the effect *per se* of transferring the *dominium* of such movables situated in this colony. (See *Burge*, 752.) In *Howse's Case* (8 Juta, 14), this Court granted an order in aid of the London Bankruptcy Court, and recognised the general rule that moveable property is subject to the law of the owner's domicile. The bankrupt had been domiciled in England as well as in the Colony, but the bankruptcy proceedings having first commenced in England the Court held that, as a matter of comity, the receiver appointed by the English Court should be allowed to take possession of the movables in this country for distribution among the creditors. It does not follow that a voluntary conveyance in England by a company of assets situated in this colony, even if followed by the appointment by an

English Court of a receiver to carry out the terms of the conveyance, must necessarily be recognised by this Court as vesting those assets in the receiver. If before the order of the High Court for winding up the company the receiver had obtained delivery of the movables his title would have been complete, and the subsequent appointment of the respondent as liquidator would not have divested him of that title. The transaction was intended to be completed in this colony, and without delivery of the moveable assets to the trustees or receiver the ownership under our law remained with the company. But the deed, although purporting to be a conveyance, was really not intended to operate in this colony as a transfer but as a mortgage. The recital states that a power of attorney had been sealed by the company constituting Griffin the attorney of the company, to do all acts necessary to effect the intended charge according to the laws of the Cape of Good Hope, and in particular to grant a hypothecation of all the said mining claims and a general notarial mortgage bond over the property of the company in favour of the trustees. Accordingly the incumbrance was created in the only way in which it could be validly created in this colony, by the registration of a mortgage bond and not by transfer of the claims. The trustees obtained a *jus in re* but it was a *jus in re aliena* the ownership remaining in the company. The receiver upon his appointment by the English Court acquired no rights beyond those vested in the trustees. If he had sued the company in our Courts upon the mortgage debt the property mortgaged would have been declared executable, and thereupon he might have proceeded to a sale in execution of the claims. But before the receiver could realise the assets the company was ordered to be wound up, and the respondent was appointed official liquidator with powers of sale. Even without such powers of sale, the liquidator would have been entitled, under the 148th section of Act 25 of 1892, to take under his control all the property, effects, and things in action to which the company was entitled. The claims, according to the law of this colony, formed part of such property, and so long as the order for winding-up holds good, all questions of preference in respect of the proceeds of those claims must be decided according to the law of this colony. It may well be that the English Courts have in some instances allowed a receiver appointed on behalf of debenture-holders to realise the property conveyed to them to the exclusion of the subsequently appointed liquidator. I take it that this has been allowed as a matter of convenience and not of right, but be this as it may, when a conflict of jurisdiction arose the Court below was justified in treating the liquidator

appointed by itself as the proper custodian of the company's assets. Such a thing as a mortgagee taking possession of the mortgaged property for the purpose of selling it is wholly unknown to our law and practice, even as between the mortgagee and the mortgagor himself. The mortgagee can only realise his security by order of the Court and through the medium of the sheriff or other officer of the Court, as was fully explained in the recent case of *Cape of Good Hope Bank v. Melle*. In case of the insolvency of a mortgagor or pledgor it is the trustee of his insolvent estate, and not the mortgagee or pledgee, who is entitled to take possession of and realise the property. Even where the transaction is in form a sale or conveyance the Court looks at the substance of the transaction and treats it as a mortgage only if such be its true nature. The trustee in insolvency is of course bound to give effect to the mortgagee or pledgee's real rights, and to award to him such preference, in the distribution of the assets, as the law allows him. Where the debt is owing by a company in the course of being wound up, the principles regulating the proof, claim, and payment of debts in the case of the judicial insolvency of any individual must be observed by the liquidator. (See section 201 of Act 25 of 1892.) In the distribution therefore of the proceeds of the claims and other assets of the company now in question the respondent will be bound fully to recognise all the debenture-holders' rights of preference. But upon the question whether the applicant or the respondent is entitled to the control and possession of the assets of the company, I entertain no doubt whatever that, until the orders of the High Court winding up the company and appointing the liquidator with full powers are reversed, the Court below was quite right in deciding in favour of the respondent. As to the second question, whether the High Court ought to have restrained the respondent from selling the assets before the 31st December, 1893, this was a matter within its discretion which this Court should not hastily interfere with. Assuming the bond to be a valid one, the debenture-holders have the greatest interest in the time and mode of selling the company's Colonial assets, and their wishes may fairly be consulted by the Court and by the liquidator. It might perhaps have been advisable to fix a later date than the 18th December for the sale, but there is not very much difference between that date and the one asked for by the applicant, namely, the 31st December. The Court below has safeguarded the applicant's rights by directing that any sale shall be subject to confirmation by the Court. The applicant will therefore have a further opportunity of objecting to any sale whereby the debenture-holders' rights might be sacrificed or otherwise prejudiced. The appeal must, in my opinion, be dismissed with costs.

Their lordships concurred.

Appellant's Attorneys, Messrs. Fairbridge & Arderne; Respondent's Attorneys, Messrs. Van Zyl & Buissin  .

CLEMENTS V. ROBERTSON'S
EXECUTORS.

{ 1893.
Dec. 1st.

Executors—Action for an account.

This was an action for an account instituted by John Clements, married in community of property to Sarah Kate Clements (born Divine), against William Biddlecombe and Joseph Devery as executors testamentary of the estate of Mary Robertson (born Hogan).

The declaration alleged that the plaintiff was the husband of Sarah Kate Clements (born Divine), daughter of the late Mary Robertson by her first husband, one Divine, to whom she was married in community of property and resided at Kimberley. That the defendants were the executors testamentary of the estate of the late Mary Robertson, and were sued in such capacity.

That by the will, dated 23rd April, 1881, of the late Mary Robertson the said Sarah Kate Clements was entitled together with her sister, Maria Ann Divine, married to one Lawler, to the life usufruct of the whole of the estate of her said mother, the late Mary Robertson, and by the said will the defendants were appointed executors, and thereafter took out letters of administration.

That it was the duty of the defendants to file a just and true account of the estate of the late Mary Robertson, but though requested to do so, they had failed to file a full and true account of their administration of the said estate between the years 1882 and 1893.

The plaintiff claimed:

(1) That the defendants might be ordered forthwith to file with the Master a full and true account of their administration of the estate of the said Mary Robertson, supported by vouchers to debate the said account, and pay to the plaintiff such sum as might be found due to him.

(2) Alternative relief.

(3) Costs of suit.

The first-named defendant in his plea alleged that he had duly filed accounts, and that the plaintiff had received money under the same, and that it was not his duty as executor to file accounts year by year.

Mr. Graham appeared for the plaintiff, and Mr. McLachlan for the first-named defendant, the last-named defendant appeared in person.

Mr. John Clements, the plaintiff, said his wife was entitled to half the income of the estate, which consisted of an hotel, which had formerly been rented for £7 per month,

Sarah Kate Clements said she was the daughter of the late Mary Robertson. Her mother was first married to a Mr. Divine, and subsequently to Mr. Robertson. She died in 1882. She (witness) received £20 from the executors in 1888, and £80 from the Colonial Orphan Chamber recently. She had received nothing besides these amounts.

A doctor's certificate was put in stating that Mr. Biddlecumbe was unable to appear in court. The other executor, Devery, stated that he had left all the management to his co-executor.

The Court gave judgment for the plaintiff.

The Chief Justice said he was by no means satisfied that the account rendered by the executors was by any means such an account as they ought to have rendered, even as executors. The will, moreover, appointed them also as administrators, that was, as the trustees, to administer the property after they had accounted for it as executors. In point of fact, they had administered the property. One of the administrators had received the rents and profits of the property, but for a certain portion of the time during which he had received the rents and profits, there was no account rendered. Surely he was bound to have rendered a proper account, if not in his capacity as executor, at all events in his capacity as administrator. It was a pure technicality to contend otherwise. He would advise the amendment of the declaration, so as to add, after the words "of executors testamentary," "and administrators." This amendment could in no way prejudice the defendants. Devery seemed to have left the whole administration of the estate in the hands of his co-executor. The Court would make an order in terms of the prayer of the declaration, and the costs would have to be borne *de bonis propriis* by the defendants. The account must be filed within six weeks.

[Plaintiff's Attorney, Gus Trollip; Defendants' Attorney, H. P. du Preer.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN
and Mr. Justice UPPINGTON, K.C.M.G.]

Ex parte BOTHA. } 1898.
Dec. 5th.

On the motion of Mr. Tredgold, Mr. Christian Laurens Botha was admitted as an advocate. The oath to be taken before the British Resident at Pretoria.

In re SOUTH AFRICAN MILLING } 1898.
COMPANY. } Dec. 5th.

Company — Trust deed — Alterations —
Increase of capital—Registrar of Deeds—
Notices—Act 23 of 1861—Act 13 of 1888.

Where it had been resolved at a special general meeting of shareholders of a company registered with limited liability under Act 23 of 1861 to alter the name of the company, to increase the capital, and to issue debentures, and notice of the change of name was given to the Registrar of Deeds in terms of Act 13 of 1888 section 2, but no notice of the increase of capital had, through an oversight of the company's attorneys, been given to the Registrar in terms of section 12 of the Act, nor had a copy of the new or supplemental deed of settlement been transmitted to the Registrar within one month as required by section 7 of Act 23 of 1861, the Court on the petition of the directors, and on being satisfied as to their bona fides, authorised the Registrar of Deeds to register the increase of capital and the alterations made to the trust deed, but without prejudice to the rights of creditors, or of the Government to insist upon any fine payable under the Act.

This was the petition of the directors of the abovenamed company, which formerly traded under the style of the Port Elizabeth Steam Mill Company (Limited), and was registered with limited liability under Act 23 of 1861.

On the 18th March, 1891, the Port Elizabeth Steam Mill Company entered into an agreement with Attwell & Co., of Cape Town, whereby they took over the milling business of Attwell & Co.

In order to carry out the agreement with Attwell & Co. it was necessary to have the articles of association or trust deed of the said Port Elizabeth Steam Mill Company (Limited) altered, and the company's attorneys were accordingly instructed to draft the necessary notices to shareholders and the proposed alterations, and to submit the same to a special general meeting of shareholders, and generally to carry out all the legal requirements in connection with the same.

The notice was given to shareholders as required by law and the said articles of association, and at a special general meeting of shareholders held at the company's offices in Queen-street, Port Elizabeth, on the 16th April, 1891, the proposed alterations to the trust deed were formally resolved upon.

Among the alterations resolved upon were: The alteration of the name of the company from "The Port Elizabeth Steam Mill Company (Limited)" to "The South African Milling Company (Limited)," and the increase of the capital of the company from £26,500, in 18,250 shares, of £2 each, to £150,000, in 150,000 shares, of £1 each, and authority given to the directors to issue debentures to the extent of £20,000.

Due notice of the alteration of the name of the company was given by the company's attorneys to the Registrar of Deeds, in terms of section 2 of Act 18 of 1888, and a certificate to that effect was duly received, but no notice was given of the increase of capital as required by section 12 of the said Act, nor was a copy of the new or supplemental deed of settlement transmitted to the Registrar within one month as required by section 7 of Act 28 of 1861.

The petitioners alleged that they were not aware why these formalities were not observed, and believed that everything as required by law had been done.

The issue of the 20,000 debentures, as resolved upon in the said amended trust deed, was duly carried out, and the company's property duly mortgaged in security thereof without any obstacle.

In September, 1898, the directors of the company entered into an agreement with the Attwell Baking Company (Limited), and in order to enable them to carry out the terms of that agreement, it again became necessary to alter the trust deed of the said company, and they therefore instructed their attorneys to draft the necessary notice to shareholders and the proposed alterations, and to submit the same to a special general meeting of shareholders.

Due notice was given to shareholders as required by the law and by the trust deed, and at a special general meeting of shareholders, held at the company's office on the 19th September, 1898, the proposed alterations were duly resolved upon.

Amongst the proposed alterations, the directors were authorised to issue debentures to the extent of £25,000, in addition to the £20,000 debentures above referred to.

The company was about to issue the additional debentures when it was discovered that, with the exception of the alteration of the name of the company, the previous alteration agreed upon on the 16th April, 1891, had never been registered as required.

Since 16th April, 1891, to the present date the only creditors of the company are the holders of the £20,000 debentures and members of the Attwell Baking Company (Limited), and the ordinary monthly creditors of the company, who, as they become creditors, are paid off from month to

month, and whose claims at present do not exceed £5,000, which will be paid at the expiration of the current month.

The directors alleged that they had every half-year, as required by law, caused the returns of shares issued or transferred to be furnished to the Registrar of Deeds and to the Civil Commissioner of Port Elizabeth, and that they had also regularly made the required declaration to the Civil Commissioner relative to the amount of the company's subscribed capital, and these declarations had all shown the increased capital upon which joint-stock companies' licence fees had been duly paid.

Further, that they had acted throughout in good faith, had never attempted to conceal anything, and thought that their attorneys had done all lawful and necessary acts to carry out the provisions of Acts 28 of 1861 and 18 of 1888 with regard to the alteration of trust deed and increase of capital.

That no person whatever, whether shareholder or creditor, would in any way be prejudiced by the registration of the increased capital and the alterations to the trust deed resolved upon on the 16th April, 1891, and the 19th September, 1898.

The prayer was for an order authorising the Registrar of Deeds to register the increase of capital of the company and the alterations made to the trust deed on the 16th April, 1891, and 19th September, 1898, as required by law.

The Registrar of Deeds reported that the statements contained in the petition were correct in so far as they affected his office, and that the language of section 7 of Act 28 of 1861 seemed to leave him no alternative but to refuse to accept the new deed if tendered after the lapse of one month after date.

Mr. Rose-Innes, Q.C., was heard in support of the application.

The Chief Justice said: The Court will make the order asked for, but without prejudice to the rights of creditors, and without prejudice to the rights of the Crown to insist upon the fine.

[Petitioners' Attorney, Gus Trollop.]

CLEMENTS V. ROBERTSON'S { 1898.
EXECUTORS. { Dec. 5th.

Mr. Graham reverted to this case, which was heard on the previous day, and applied for an order for the expenses of the plaintiff from Kimberley, the application have been omitted on the previous day through an oversight.

Mr. McLachlan appeared to oppose the application on the ground that the evidence of the plaintiff was of no value in the case.

The Court considered that the evidence of the plaintiff was necessary, and ordered that his expenses must be included in the costs, but not the costs of the present application

KING AND HIRSCH V. TRUSTEES { 1893.
O.R. ASBESTOS COMPANY. { Dec. 5th.

This was an application for an order to amend the record in the appeal from the Supreme Court (Cape Colony) to Her Majesty in her Privy Council, so as to make it clear that the deposit of £14,000 was only on behalf of the applicants and was not intended to cover the judgment of the Court against Weingarten.

The petitioners, Henry James King and Herman Hirsche, together with Solomon Weingarten, were granted leave, by order of the Supreme Court, dated 18th March, 1893, to appeal to the Privy Council against a judgment given by the Supreme Court on a cross appeal from a judgment of the High Court of Griqualand, between them and the Orange River Asbestos Company. The three appellants had been given leave to appeal on depositing as security £14,000, the amount in question. Afterwards Weingarten, it was alleged decided not to appeal, and the petitioners prayed that the record might be amended to the effect that the deposit of £14,000 was only on behalf of King and Hirsche.

Mr. Graham appeared for the applicants and Mr Searle for the respondents.

The Chief Justice said: The £14,000 was paid by King on the presumption that Weingarten was a co-appellant. If Weingarten really withdrew his appeal there could be no injustice in authorising the amendment which was now prayed for, but there was no proof before the Court excepting one letter that Weingarten had withdrawn his appeal, and without some formal consent from Weingarten it was impossible for the Court to make the order applied for. The applicants had been premature in applying to the Court. At the same time, however, to prevent further expense, the Court would authorise the Registrar to amend the record upon the production of the written consent of Weingarten or his attorneys that the order giving him leave to appeal should be discharged. The applicants must pay the costs of the present application.

BRINK V. LAUBSCHER'S { 1893.
EXECUTOR. { Dec. 5th.

Fidei-commisum—Will—Executors—Bond.

This was an action for a declaration of rights, under the will of the plaintiff's father, instituted by Mrs. A. M. Brink against Harry Gibson, in his capacity as secretary of the South African Association, and as such the surviving executor of the estate of the late Johannes Albertus Laubscher.

The declaration alleged that by the will of the late Johannes Albertus Laubscher the plaintiff and her brother, now deceased, were appointed

sole heirs of their father's estate, subject to *fidei-commisum*, in favour of their children, and the will directed that what at the death of the said testator should appear to be owing to his estate by his son and daughter, or her husband, should not be called up during their lifetime, but that such debt after their death respectively should be made over to their children respectively.

That during the lifetime of the said testator he advanced between £5,000 and £6,000 to his son, £550 to plaintiff's late husband on mortgage, and gave plaintiff £2,000 as a gift.

The testator died on the 25th June, 1884, and in the month of October, 1881, the plaintiff's husband died.

In or about the month of September, 1884, the plaintiff, being in ignorance of the terms of her late father's will, and her rights thereunder, and induced by the representations of the then executors, that the aforesaid sum of £2,550 was due by her to the estate of her late father, and under threats held out by the said executors that the bond for £550 could and would be called up, and the property mortgaged thereunder sold, passed a bond in favour of the said executors for the sum of £2,550 sterling with interest at 6 per cent., and subsequently in July, 1892, in pursuance thereof and in ignorance of her rights under the will, sold certain portion of the property mortgaged as aforesaid, and paid the sum of £1,250 into the hands of the surviving executor, the defendant.

The plaintiff now maintained that she was not bound, in view of the terms of her late father's will, to pass the said bond, or to pay the sum of £550 to the defendant in his capacity, and claimed the cancellation of the said bond and the repayment of the said sum of £1,250, with interest from the month of July, 1892, but the defendant refused to cancel the said bond or to repay the said sum, and claimed that the plaintiff was bound to pass the bond and pay the said sums, and was not entitled to have the said bond cancelled or the said moneys repaid.

The plaintiff claimed:

(a) A declaration of her rights under the will of her late father.

(b) The cancellation of the said bond for £2,550 and the repayment of the sum of £1,250 with interest.

(c) Further relief, with costs of suit.

The defendant in his plea denied the gift of £2,000, and said that at the death of the testator the sum of £2,000 was due by the plaintiff to his estate, being for money lent and advanced to her during his lifetime.

He admitted the passing of the bond for £2,250 and the payment of £1,250.

He denied that any improper representations or threats were made by the then executor to the

plaintiff, but that the said bond was voluntarily passed by her in order to secure her children and with a full knowledge of the terms of the will.

That no interest had been demanded from or paid by the plaintiff in respect of the said bond, and the said sum of £1,250 was voluntarily paid by the plaintiff in order to obtain the consent of the defendant to the transfer of certain properties which had been mortgaged by her, and that interest on the said sum of £1,250 had since the said date been paid to the plaintiff.

Finally, as executor he alleged that he was not bound to consent, nor justified in consenting, to cancel the said bond or to return any moneys paid under it, and prayed that the plaintiff's claim might be dismissed with costs.

The defendant claimed in reconvention:

(a) An order declaring that the plaintiff was indebted to her father's estate in the sum of £2,000 as directed by his will.

(b) Further relief, with costs of suit.

The clause of the will relied upon by the plaintiff was as follows:

I hereby further will, desire, and stipulate that whenever my son and my daughter, or her husband may appear to be indebted to my estate, the same shall not be called up during their lifetime, but such claim shall, after their respective deaths, be made over to their children respectively.

Mr. Searle and Mr. McLauchlan appeared for the plaintiff, and Mr. Rose-Innes, Q.C., and Mr. Molteno for the defendant.

Mrs. Anna Maria Brink, the plaintiff, stated that she was the widow of the late Jacob Brink, and that she and her brother, Johannes Albertus Laubscher, were the only two children of the late Johannes Albertus Laubscher, who made the will in question. Her husband, to whom she was married in community of property, died in 1881. During her father's lifetime her brother managed his business. He held her father's power of attorney for some years prior to her father's death. Her father during his lifetime advanced to her brother some £5,000 or £6,000. Her brother spent this money in building and paying debts. Her father agreed that she should have a similar amount to that received by her brother. As a matter of fact, he gave her £2,000 about a year before his death. Her son drew the amount in cash from the bank. Her father died in 1884, and at the time of his death she had only received this £2,000, although her father intended to give her more. At that time her husband also owed to her father a mortgage bond for £555, and her brother owed a mortgage bond for a similar amount. These bonds were on certain houses that her father had divided between herself and her brother. After her father died, her brother and

Mr. Denysen were the executors of the estate. In September, 1884, she passed a bond acknowledging that she owed the estate the sum of £2,555, after she had received a letter of demand from the executors testamentary. Her brother died in August, 1885.

By the Court: She did tell the executors that her father had made her a present of the £2,000. She left the whole matter with her son, who was nineteen years of age at the time.

Continuing her evidence, Mrs. Brink stated that three years ago she sold some of the bonded property. She obtained about £1,400 for it, and of this sum she paid £1,250 into the association. She did not pay any interest to the executors under the bond, but she received her share in the interest on the capital of the estate. Since she had paid the £1,250 into the association she had received 4½ per cent. upon it. Continuing her evidence, Mrs. Brink stated that she had recently negotiated the sale of some further property mortgaged under the bond referred to, the property known as Belvidere, and had been sold for £1,750. There was a first mortgage on it for £1,870, and she had paid the balance into the association. After this second transaction she looked into her father's will and became aware of her rights, in consequence of which the present action was instituted. She was the guardian of her children under her husband's will. There were four minor children and no major, the son referred to having died. She was anxious to have the £1,250 and the £580 paid out to her, so that she might invest it in building. She had houses of her own, which paid her 7 or 8 per cent., and she wished to invest the money now in the association, which only paid 4½ per cent. in building. She was willing to pass a bond of £2,555 in favour of her children upon the property, if the Court should order so.

By Mr. Innes: She had formerly left the matter very much in the hands of her son. She wished to obtain the money from the association because she thought she could do better with it.

Re-examined by Mr. Searle: She tried before to obtain access to her father's will, but was unable to do so. She did not know whether her son ever saw the will or not. He died about four years ago.

For the defence,

Mr. Harry Gibson stated that he was secretary of the South African Association, now sole executor in Laubscher's estate. He had no personal knowledge of the passing of the bond referred to. It was done in the time of Mr. Denysen, who died in 1887. The position the directors of the association took up as administrators of the fund, out of which the children would have to obtain their inheritance after their

mother's death, was that they did not feel justified in parting with the bond which they had in their hands. The bond was just covered without very much margin.

The Court gave judgment for the plaintiff.

The Chief Justice said: There was no charge of misrepresentation in the declaration, and there was really no necessity to enter into the question whether there was any misrepresentation or not, inasmuch as Mr. Searle admitted that there really was no gift of the £2,000 to the plaintiff. The only question which remained was whether the security which the plaintiff was now prepared to give to her children was equally valuable security to that which already existed. He would think that security upon landed property to the satisfaction of the South African Association would be quite equal to the present security of the association, and, therefore, the children could not possibly regret it if the nature of the security was now altered. After all it was only in the interests of the children that this should be done. The Court would, therefore, authorise the plaintiff to pass a bond of £2,550 in favour of the defendants in their capacity as administrators of the *fidei-commissum* funds, created by the testator. Upon such bond being passed the Court would direct the defendants to cancel the bond in their favour for £2,555, and to pay to the plaintiff the sum of £1,350 paid by her to the defendants. Judgment must be given in favour of the plaintiff in reconvention as prayed for, and the costs of the action would have to come out of the estate.

[Plaintiff's Attorney, H. P. du Preez; Defendant's Attorneys, Messrs. J. C. Berrangé & Son.]

SERRURIER V. SERRURIER.

Mr. Graham moved for leave to petitioner to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

Referred to counsel.

BEHRENS V. BEHRENS.

Mr. Graham moved for authority to the plaintiff to effect service of the process in the suit instituted against her husband for restitution of conjugal rights by publication in newspapers, it being impossible to effect personal service, and for leave to the plaintiff to give her evidence by affidavit or before a commissioner of this Court.

The order was granted, returnable on February 28, notice of citation to be published in the Pretoria "Press" as well as in the "Zuid-Afrikaan." The Resident Magistrate at Poddie was appointed commissioner to take the evidence of the plaintiff.

MCGRATH V. MCGRATH.

Mr. Molteno said a rule *nisi* had been granted in this case returnable on November 30, and applied for leave for the plaintiff to sue *in forma pauperis*.

Leave was granted.

Ex parte DE WET.

Mr. Searle moved to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act, 1881, for transfer to the petitioner of certain portion of the farm Meerendal, in the Cape Division, at present registered in the names of P. & O. Brodenkamp.

The order was granted.

Ex parte STRAUSS AND OTHERS.

Mr. Molteno moved for authority to the Registrar of Deeds to cancel certain mortgage bond for £179 4s. 8d., passed on the 1st April, 1861, by petitioners in favour of Heremias O. Nieuwoudt, the said bond having been paid off in or about 1868, but not cancelled in the Debts Registry.

A rule *nisi* was granted returnable on the 12th January, one publication in the "Government Gazette."

On the return day (January 12, 1894) the rule was made absolute.

In re CAPE OF GOOD HOPE BK, } 1893. IN LIQUIDATION. } Dec. 5th

Mr. Innes presented the following sixth report of the official liquidators of the Cape of Good Hope Bank:

1. The liabilities of the bank now stand in the books at £2,050,122 11s. 4d., of which £2,039,360 2s. 7d. have been proved. The balance consists of bank notes, £6,884 10s.; a fixed deposit, £65 6s.; and sundry small current accounts, bills payable, &c.

2. Since the date of their last report on October 12, 1892, the liquidators have declared two dividends of 1s. 8d. each, amounting with former dividends and certain preferent claims payable in full to £1,911,911 8s. 11d., or 18s. 9d. in the £ on the amount proved.

3. Up to this date the liquidators have collected £22,487 9s. 9d. as dividends on shares held as security, and £30,551 15s. 8d. as interest paid by debtors and by the Standard Bank on sums placed with them from time to time on fixed deposit at short notice.

4. The remaining assets have been valued, and even in the present depressed condition of the share market amount to £64,250, which would yield a further dividend of 7d. in the £, or a total of 19s. 4d. It will be remembered that in their fourth report the liquidators estimated the ultimate

outcome of the estate at 18s., and in their fifth report at 19s. 1d. in the £. The progressive improvement thus exhibited has in a great measure resulted from the treatment described in a former report of "nursing," of which one instance among many may be quoted, namely that of a debtor whose liabilities at the date of the stoppage of the bank exceeded £28,000, of which about £22,000 was covered, the deficiency being about £11,000. This deficiency has now entirely disappeared, and there is a margin toward interest, the liabilities having been reduced to £3,168, against securities of £8,650. The liquidators anticipate payment in full of this account with interest.

5. The third year of the liquidation ended on the 26th September last, since which date the sum of £18,295 12s. 2d. has been collected. The amount of former dividends unclaimed up to the 15th inst., when the seventh dividend became payable was about £4,000.

6. With regard to the future the liquidators would observe that many of the remaining debts are bad or very doubtful, and of the other assets many are unsaleable owing to the operation of adverse influences, which the liquidators believe they will be able, with time, either to counteract or otherwise obviate; they are accordingly of opinion for this reason, in addition to that to be inferred from paragraph 4, that the creditors, who have received 18s. 9d. in the £, will be best served by delaying the realization of the remaining assets, and in order that the personal interests of the liquidators may not be supposed to conflict with those of the creditors, they would respectfully request Your Honourable Court to order that their remuneration should be fixed not by way of annual allowance as heretofore, but by way of such percentage as to Your Honourable Court may seem reasonable, on the amount collected and to be collected from September 26 last until their work is done.

7. The liquidators further ask Your Honourable Court to fix a date, say March 31 next, after which no claim shall be recognised except by your special order, to be obtained by and at the cost of the claimant.

(Signed by the official liquidators, Messrs. L. A. Vincent, Harry Bolus, H. T. Feltham, and J. R. Reid.)

Mr. Innes asked for the usual order.

The order was granted.

[Attorneys for the liquidators, Messrs J. H. Reid & Nephew.]

WERNAND V. VAN DER SCHIFF.

Mr. Searle moved to make the award of the umpire in the matter between the parties a rule of order of Court.

The order was granted.

NESBITT V. NESBITT.

In this matter the rule nisi for dissolution of marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights was discharged, owing to the failure of the plaintiff to file an affidavit that her husband had not complied with the order of Court.

BACHE V. THE S.A. MILLING COMPANY. { 1898.
Dec. 5th.

Bill of lading—Charter party—Freight—Reference to margin—Ambiguity.

In the body of a bill of lading for a cargo of wheat from Australia on board a ship "bound for Algoa Bay for orders" freight was made payable "as per charter party," and in the margin freight was stated to be at 18s. 9d. per ton.

The Charter party, as construed by the Court, stipulated for freight, in the event which happened, at 17s. 6d. per ton, and contained a clause that 5 per cent. commission upon the estimated gross freight should be due upon the signing of the charter party by the ship to the charterers.

Held, in an action brought by the Master against the consignees, that the effect of the body of the bill of lading was not controlled by the words in the margin, and that the plaintiff was entitled only to freight at the lower rate in terms of the charter party.

Argument on exception.

The declaration alleged that the plaintiff was the master, and as such the representative of the owners, of the British ship Bay of Naples and that the defendants were the trustees of the S.A. Milling Company (Limited), hereinafter called the defendant company, which has its head office at Port Elizabeth.

On or about the 14th June, 1893, the said ship was chartered by the firm of John Darling & Sons, grain merchants, at Adelaide, South Australia, to proceed with a full cargo of wheat or flour from any port in South Australia to such one of a number of specified ports, including certain ports in this colony, as the charterers might direct. It was specially stipulated in the charter party that the freight should be 17s. 6d. per ton of 2,000 lb. if the ship were ordered to Algoa Bay or Cape Town direct, and 18s. 9d. per ton calling at Algoa Bay for orders, if ordered on to Cape Town with part or whole shipment.

Thereafter the said ship was laden with a cargo of 18,016 bags of wheat, consigned to the defendant company. The bill of lading stipulated that freight should be as per charter party, and set forth the fact that the said ship was bound to Algoa Bay for orders. A copy of the said bill of lading was annexed to the declaration, and the plaintiff said that the endorsement upon the margin thereof was made by the consignors of the cargo.

The ship left Port Augusta on the 1st of August, 1898, bound to Algoa Bay for orders, and she arrived at that port on the 23rd September, 1898. The plaintiff reported his arrival to the defendant company on the 26th September, 1898, and asked for orders.

The defendant company did not thereupon give final orders to the plaintiff, but directed him to discharge a portion of the cargo at Algoa Bay. Though the plaintiff made repeated request to the defendant company for orders as to the remainder of the cargo, the said company neglected to give him any orders as to the whole of the said cargo till the 2nd October, 1892, on which day he was instructed to land the whole of the cargo at Algoa Bay. The plaintiff finally alleged that the whole of the said cargo had been landed, and that he was entitled to be paid the sum of £1,877 18s. 6d., being freight thereon at the rate of 18s. 9d. per ton of 2,000 lb. That the defendant company was willing to pay freight at the rate of 17s. 6d. per aforesaid ton, and had paid to the plaintiff, who had accepted the same without prejudice, the sum of £1,762 14s. 9d., being for freight so calculated, but they refused to pay the further sum of £125 8s. 9d., being the difference between the two amounts aforesaid, though all things had happened, all conditions fulfilled, and all times elapsed to entitle the plaintiff to demand the said sum, the defendants refused to pay the same or any part thereof.

The plaintiff claimed:

- (a) Payment of the said sum of £125 8s. 9d.
- (b) Further relief.
- (c) Costs of suit.

The defendant company excepted to the declaration on the grounds that it disclosed no cause of action, in that it appeared from the declaration and the annexures thereto, that the freight should be 18s. 9d. per ton upon the ship calling at Algoa Bay for orders only, if the ship should be ordered on to Cape Town with part or whole shipment and further appeared that the ship was not so ordered on to Cape Town, but that the entire shipment was landed at Algoa Bay.

Wherefore the defendant company prayed that the declaration might be set aside with costs.

The endorsement on the bill of lading referred to in the pleadings was as follows: 18,016 bags

wheat, 2,008 tons net, at 18s. 9d. Freight, £1,877 18s. 6d.

Mr. Schreiner, Q.C., A.G. (with him Mr. Ship-pard), was heard in support of the exception.

He contended that the amount of freight due must be gathered from the charter party to which the bill of lading made specific reference. The endorsement on the margin could not be regarded as incorporated in the bill of lading.

The work for which 18s. 9d., was to be payable had not been done, and the lower freight, 17s. 6d., was only payable.

Mr. Rose-Innes, Q.C. (with him Mr. Webber): Some meaning must be given to the marginal note, see *Mackill v Wright Bros.* (14 App. Cas., 106). The ship having proceeded to Algoa Bay for orders the higher freight was payable.

Where there is a variance between the charter party and the bill of lading the latter must be looked to. *Gardner & Sons v Trechmann* (15 Q.B.D. D 164)

The Attorney-General replied.

The Court sustained the exception.

The Chief Justice said: The consignee who claims and receives the goods under a bill of lading is bound to pay the freight stipulated for by the bill of lading. On reference to the body of the bill of lading now in question we find the words "freight, and all other conditions for, as per charter party." What then are the terms, as to freight, of the charter party? "Seventeen shillings and sixpence per ton if ordered to Algoa Bay or Cape Town direct, and eighteen shillings and nine pence calling at Algoa Bay for orders, if ordered on to Cape Town with part or whole shipment." The declaration states that the ship was despatched to Algoa Bay for orders, that a portion of the cargo was there discharged, and that after the plaintiff, the master of the ship, had been there for some time waiting for orders, he was instructed to land the whole cargo at Algoa Bay. There is no claim for demurrage, but the plaintiff claims payment of the freight at the higher rate of eighteen shillings and ninepence. The reasonable meaning of the charter party appears to me to be that if the ship had to call at both the ports the higher freight would be payable whether part or the whole of the shipment were landed at either port, but that if the whole of the shipment was landed at Port Elizabeth and the ship was not sent to Table Bay the lower rate would be payable, whatever claim for demurrage the shipowner might have. According to this view, the plaintiff would be entitled to payment only at the lower rate. In support of his claim for the higher rate the plaintiff relies upon the statement in the margin of the bill of lading that the freight is payable at 18s. 9d., being the higher rate mentioned in the charter party. But the

body of the bill of lading is in the ordinary form, and, in unambiguous terms, stipulates for the payment of the freight fixed by the charter party. It makes no reference to the words in the margin, and ought not in my opinion to be controlled by them. It has been suggested on behalf of the defendants that the entry was made in the margin for the purpose of estimating the gross freight on which commission should be payable under the 17th clause of the charter party, which provides that "five per cent commission upon the estimated gross freight is due on signment of this charter party by the ship to J. Darling and Son." The suggestion is a reasonable one, and removes any doubt which might have existed as to the true meaning of the bill of lading. The exception to the declaration must be allowed with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buisson; Defendants Attorney, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.

Ex parte NORTON.

{ 1898.
Dec. 6th.

On the application of Mr. Webber, Mr. John Norton was admitted as an attorney and notary.

BUTLER V. BUTLER AND MEESER. { 1898.
Dec. 6th.

This was an action for divorce brought by the plaintiff, Edgar John Butler, against his wife Catherine Henrietta Butler, on the ground of her adultery on divers occasions with the second defendant, Christian J. Meeser. The plaintiff claimed:

A decree of divorce.

The custody of the two minor children.

£300 damages from the second defendant.

Mr. Graham appeared for the plaintiff.

Both defendants were in default.

Edgar John Butler, the plaintiff, stated that he was a clerk, residing in Cape Town. He was married on the 6th December, 1882, to the first defendant. After his marriage he lived partly in Cape Town and partly in Woodstock. Four children were born, of whom two were still living, a boy ten years of age, and a girl five years of age. The children were in Mrs. Butler's custody. He lived

happily with his wife until June of the present year. About that time he learned that Christian John Meeser, the second defendant, was visiting his wife. He told her that he thought Meeser was becoming too intimate, and that a stop would have to be put to his visits. His wife made no reply. On the evening of the 24th June plaintiff was at home asleep on the couch. Shortly before twelve o'clock he awoke and found Meeser in the parlour with his wife. He rose and turned Meeser out. Mrs. Butler also left the house voluntarily. She went to the house which was occupied by Meeser and his mother. This was on Saturday evening. He did not see his wife again until the following evening. Owing to this disagreement he received a letter soon afterwards from Mr. Silberbauer, demanding a separation on behalf of Mrs. Butler on the ground of ill-treatment, violence, and turning her out of the house. He had not ill-treated her or turned her out. Subsequently a deed of separation was drawn up. Plaintiff did not consent to this deed at first, but his wife insisted upon it, and on the 18th July it was signed. According to the deed his wife was to have the custody of the children, he was to pay her £9 per month, and certain furniture was to be made over to her. After the separation, plaintiff's wife moved from Station-road, Woodstock, where they had been living, to Frere-street, a short distance away. Plaintiff sometimes saw his children twice a week after the separation. He also saw Meeser with his wife on several occasions in the evenings. Once he asked her what Meeser was doing there, and she told him (plaintiff) to mind his own business, as it was her own house, and she could do as she liked. Plaintiff afterwards employed a detective named Loader. He watched his wife's house on several occasions in company with Loader, and found that Meeser visited Mrs. Butler at all hours of the night. Meeser was a clerk in the employ of Messrs. Dance & Davidson, and had also an engagement at the theatre in the evenings. He did not know what Meeser earned. He wished to have the custody of his children. He had never seen his wife intemperate.

Christina Zyster said she had been in the service of Mrs. Butler both before and after the separation. She knew Mr. Meeser. He took all his meals at Mrs. Butler's house after the separation. Meeser used to visit Mrs. Butler in Frere-street in the evenings, and used to stay sometimes till two in the morning. Both Mrs. Butler and Meeser told witness to say nothing to Mr. Butler about Meeser's visits. When Meeser came in the evening witness used to take the children out of the room, and leave Meeser and Mrs. Butler together. She frequently saw Meeser kiss Mrs. Butler, and had seen him in Mrs. Butler's bedroom. Witness

was repeatedly sent to the New Brighton Hotel by Mr. Butler to tell Meesser to come. When Mr. Butler was at the house she told Meesser not to come. Witness had seen Mrs. Butler lying on the bed dressed and Meesser sitting beside her. She had also seen Meesser help Mrs. Butler to undress. Meesser left about twelve o'clock one night, and after his departure, witness went into the bedroom and saw Mrs. Butler in bed undressed. She had seen both Mrs. Butler and Meesser tipsy. They used to drink wine together in the dining-room.

Alfred William Loader, a private detective, stated that he was employed by Mr. Butler to watch Mrs. Butler's house in Frere-street. On the first night he watched, the 31st September, Meesser came to the house about half-past eleven. Mrs. Butler met him on the stoep. They went inside and Meesser remained until a quarter-past twelve. He watched the house on several nights, and Meesser always came, generally between ten and half-past. Witness located the dining-room and the bedroom in the house and said that he used to sit on a wall, whence he could see into the dining-room, and was so close to the bedroom that he could touch the window and hear voices inside. Meesser sometimes remained in the bedroom until two and three in the morning. On several occasions, witness saw Mrs. Butler and Meesser in the dining-room the worse for liquor. He had seen them empty two bottles of wine in a very short time. He had often seen Meesser kiss Mrs. Butler. Meesser was a young man; he should judge about twenty-five or twenty-six years of age. On the last occasion he watched the house he saw Meesser and Mrs. Butler drinking in the dining-room, and saw kissing and other familiarities between them.

The Court granted a decree of divorce, with costs against the defendant Meesser, plaintiff to have the custody of the children of the marriage. The claim for damages was dismissed, on the ground that no evidence had been given regarding the income of the defendant Meesser and that the adultery proved took place after the separation, so that the plaintiff did not lose the society of his wife.

[Plaintiff's Attorneys, Messrs. J. & H. Reid & Nephew.]

REGINA V. ADAM LOUIS. { 1898
Dec. 6th.

Theft of sheep—Conviction quashed on appeal.

Appeal from a conviction of the accused by the Resident Magistrate of Carnarvon.

The appellants, a European hawker, and his native herd, Klaas Beest, were charged under Act 85 of 1898 with the crime of theft of cattle, in that upon, or about, the 15th day of November, 1898, and at or near Aarfontein, in the district of Carnarvon, the said Adam Louis and Klaas Beest, each or both, or one or other of them, did wrongfully and unlawfully steal one sheep and one lamb, the property, or in the lawful possession, of Lucas P. Steenkamp, a farmer residing at Aarfontein.

The accused pleaded not guilty. They were found guilty, and sentenced to one year's imprisonment with hard labour and to pay a fine of £5, and if the fine were not paid at the expiration of the year a further term of two months' imprisonment.

From this sentence Adam Louis now appealed.

The facts appear sufficiently from the judgment.

Mr. Rose-Innes, Q.C., was heard in support of the appeal.

Mr. Giddy for the Crown.

The Court allowed the appeal, and quashed the conviction.

The Chief Justice said: If it had been clear that the stolen ewe, or rather the lost ewe, had accompanied the prisoner's flock from Aarfontein to Springfontein, then undoubtedly there would have been very strong evidence against both prisoners, because they would then have been in possession of property recently stolen, and the presumption would have been that they were thieves, unless they could have given a satisfactory explanation of how they came into possession of the ewe. Now, the Magistrate in the reasons which he assigns for his decision seems throughout to assume, as a matter beyond doubt, that this ewe did accompany the flock all the way from Aarfontein. In my opinion that is by no means proved. The fact that the lamb was found slaughtered on the track of the sheep does not prove that this ewe was amongst the flock. It would have been very cogent evidence if this lamb really belonged to that ewe, but it seems it was an older lamb than the ewe could possibly have had. Now the evidence given by Hugo himself shows that it is by no means improbable that the ewe which was found in the flock of the prisoner was one which had accompanied Hugo's sheep from Steenkamp's place. In his own evidence Mr. Hugo says, "I am related to Steenkamp. My sheep were grazing in the direction from which Louis's sheep come. A ewe which has lost her lamb would run about searching for it, and the ewe in question might easily have run among mine without the herd knowing it. I heard a sheep bleating, but could not say anything about it, as I did not notice it particularly. This sheep was among mine the previous evening when the sheep reached my

kraal. This was after Louis's sheep had been kraaled, and after they must have passed mine. I asked my boy about it, but he said he had counted the lambs, and the number was correct, so that none of my sheep had lost their lambs. I was not at the kraal, but a distance away." The inference from this was that there was a strange ewe amongst Hugo's sheep that had come home that evening, and there is evidence to show that if the ewe had come into Hugo's kraal she might have gone through the gate, and so got mixed up with the accused's. Under these circumstances it is most dangerous to apply the principle that possession proves the thief. The possession was an involuntary one on his part if this ewe had rushed into his flock, so that, as far as Louis is concerned, although there is some suspicion in the case, it is a very serious thing that this man should be found guilty of theft and sentenced to this severe term of imprisonment upon such evidence. As to Beest, he has been found guilty, but he ought also, I think, to have the benefit of the quashing of the conviction. The only point against him that does not affect Louis is that he afterwards on the following day claimed the sheep, but the Magistrate went upon the ground that the sheep had accompanied the flock all the way from Aarfontein, and if the man Beest on the morning afterwards by mistake said the sheep belonged to him, I do not think that is sufficient to prove the possession and find him guilty also. At all events, I think the two cases ought to be treated on the same footing. In my opinion the Magistrate ought not to have convicted Louis, and I think he ought not to have convicted Beest. For these reasons we think the conviction in both cases ought to be set aside. Of course the case of Beest will be considered as one which came before the Court in the ordinary way.

Their lordships concurred.

[Appellants' Attorneys, Messrs. Van Zyl & Buissonné.]

NGQOBELA V. SIHELE. { 1898.
Dec. 6th.
Dec. 12th.

Marriage—Natives—Dowry cattle—Tembuland—Proclamation No. 140 of 1885—Polygamy—Domicile—Conflict of laws.

- (1) *The Courts of Tembuland may, where all the parties to a suit are natives, recognise the validity of all marriages between natives celebrated according to native law before the promulgation of Proclamation No. 140 of 1885, whether they be polygamous or not, and such Courts must decide questions of*

divorce or separation arising between natives so married in conformity with native law and custom, but the Courts of the Colony proper cannot recognise as valid any marriage entered into by a man who had one or more wives living at the time.

- (2) *Neither the Courts of the Colony nor those of Tembuland can recognise as valid any marriage celebrated after the date of the Proclamation with a man who had one or more wives living at the time.*

If a marriage between unmarried natives has been celebrated according to native law and duly registered, the effect upon the parties and their issue and property is the same as if the marriage had been contracted under the marriage laws of the Cape Colony.

If such last-mentioned marriage has not been duly registered the marriage is valid, and any questions of divorce or separation arising in the Tembuland Courts between the parties themselves must be decided according to Colonial law, but the effect of the marriage in other respects upon the parties and their issue and property must be decided according to the native law.

- (3) *Neither the Courts of this colony nor those of Tembuland can recognise the right of the husband, whose wife has deserted him, to take by force or violence the so-called "dowry" cattle while in the peaceable possession of the wife's father.*

- (4) *Such cattle or their value may be recovered by the husband by due process of law in the Courts of Tembuland if the wife has deserted her husband without just cause.*

If the marriage took place before the Proclamation it would make no difference that such marriage was polygamous; but if the marriage took place after the Proclamation the right of the husband who, at the time of such marriage had a wife living, or who after such marriage took another wife, would not be recognised.

- (5) *The Courts of the Colony proper cannot recognise the validity of any marriage celebrated in the Colony proper according to native custom without the solemnities required by Statute, and therefore the husband so married cannot, on desertion by his wife, reclaim the cattle from her father,*

(6) *The Courts of this colony will, however, recognise the validity of a marriage celebrated in Tembuland according to native law and custom between two unmarried natives.*

The cattle delivered to celebrate such a marriage may be reclaimed from the father of the wife if he is domiciled in the Colony and the wife deserts her husband without just cause.

Cruelty or a subsequent polygamous marriage would be considered to be just cause.

In an action brought before the Magistrate of Glen Grey, in this colony, by a husband married in Tembuland according to native custom before the date of the Proclamation to recover "dowry" cattle from the wife's father, then domiciled in the Colony, by reason of the wife's desertion, the Magistrate allowed an exception to the summons to the effect that marriage according to Tembu custom is immoral and therefore null and void.

Held, on appeal, that the exception ought not to have been allowed and that the Magistrate ought to have allowed evidence upon the questions whether the plaintiff at the time of his marriage had one or more wives living, and whether he had taken another wife after his marriage with the defendant's daughter.

Appeal from a judgment of the Resident Magistrate of Glen Grey in an action in which the present appellant sued the respondent for the recovery of six head of cattle or their value, £20, delivered as dowry under native law and custom.

The summons alleged :

1. That the plaintiff was a Tembu, and that in or about the month of September, 1884, and at Neora, in the district of St. Mark's, he took to wife, according to Tembu law and custom, Nonyoko, daughter of Sihle, the defendant.

2. That according to the laws and customs of their people, he delivered to Sihle, as dowry for her, the said Nonyoko, certain six head of cattle, and otherwise conformed to the said marriage law and custom.

3. That in or about the year 1887 the said Nonyoko without just cause deserted him, the said plaintiff, and had since refused to return to his kraal.

By reason of which, and according to law and custom under which the said dowry cattle were delivered to the defendant, he, the said

defendant, was bound to make good and restore the same to plaintiff, all of which though duly demanded the defendant refused to do.

The plaintiff prayed that the defendant might be adjudged to restore to him six head of cattle or pay their value with costs of suit.

Before pleading the defendant, by his agent, excepted to the summons on the following grounds :

That the contract of marriage according to the Tembu laws and customs is an immoral one, and therefore void *ab initio*.

That as this action arises out of such afore mentioned contract it cannot be maintained in War Courts.

Therefore the defendant prayed that the summons might be dismissed with costs.

The plaintiff's agent informed the Court that he was quite aware, owing to the late decision in the Eastern Districts Court, that he could not hope to succeed, but requested that evidence might be taken on behalf of the plaintiff in order that expense might be saved, as should the exception be allowed, it was the intention of his client to appeal to the Supreme Court.

The Magistrate, although upholding the exception with costs, allowed evidence to be led, being, as he stated, a matter of great importance to natives residing in the Colony, and purely a test case.

The plaintiff's evidence went to show that he "twaled" (carried away) his wife from her father's kraal in 1884, that he afterwards married her, delivered the dowry cattle to her father, and complied with all the customs of his tribe, and that three years afterwards, in 1887, his wife deserted him, went to Barkly, and refused to return to him.

No children were born of the marriage.

Natwa, a headman and chief by birth, was called to give evidence as to custom, and he adhered to the evidence which he gave in the case of *Mucume v. Neotama* (8 Sheil, 262), and stated in addition that when a father was arranging a marriage it was customary for him to send his son to act for him to the bridegroom's kraal. The custom of *twala* is that after a girl is carried off by her sweetheart, she is followed up by her brothers and then the marriage is arranged. The witness then went on to say : The position of a woman for whom no dowry is paid is that she is held up to public ridicule by the other women of her acquaintance, who call her a whore (*shweshwe*).

When a dowry has been paid and a woman's husband dies and she has a family, she is always consulted by her children when anything of importance is undertaken although the eldest son is heir to the father's estate.

Children born of a woman for whom no dowry has been paid do not stay at the kraal with their mother, but they are always taken to her father's kraal.

Children of a woman for whom no dowry has been paid (a whore) cannot claim their father's estate at his death.

If my daughter marries and leaves my kraal she can always come and ask for assistance from time to time, and according to our custom we are bound to comply with her demand if we are able.

After the death of my daughter's husband (she being properly married) the children would remain at their father's friends' kraal and if they were not properly taken care of they would return to me.

The Magistrate added a note to the record as being worthy of consideration, namely, that when a native marries a wife under Kafir custom he builds her a hut, and pays a tax of 10s. a year for the hut, and under Act 83 of 1892, section 16, he also pays a divisional rate of 2s.

The plaintiff now appealed from the Magistrate's decision.

Mr. Searle was heard in support of the appeal. He pointed out that the question to be determined was: could a native married by Kafir custom demand the return of the "lobola" or dowry from the father of his wife who had deserted him without just cause. It was clear that by native custom he could. He referred to *Malgas v. Gakavu* (6 E.D.C., 235).

The Chief Justice: In that case the marriage took place in the Colony.

The following cases were also referred to and discussed: *Nboko v. Manozweni* (6 E.D.C., 62), particularly Mr. Justice Maasdorps's judgment; *Tabata v. Tabata* (5 Juta, 328); *Dantile v. Mtirara* (2 Sheil, 386), and *Ncotama v. Mncume* (8 Sheil, 261).

There was no appearance for the respondent.

Curia ad vult.

Postea (December 12.)

The Court delivered judgment, allowing the appeal.

The Chief Justice said: This Court has decided in a recent case (*Ncotama v. Mncume*)* that it cannot recognise a native custom whereby a husband whose wife has deserted him may by force or stealth retake the so-called "dowry" cattle given by him on his marriage to her father. That was a case in appeal from a Colonial Resident Magistrate's Court, but it would make no difference whether the seizure had taken place in the Colony proper, or in those dependencies of the Colony which are regulated by special laws proclaimed by the Governor under the powers vested

in him by the Acts annexing those dependencies. The Proclamation No. 140 of 1885 authorises magistrates to decide suits between natives in those dependencies according to native law, but it does not authorise any such native to assert his rights by violence or fraud. The recent decision left untouched the question whether a husband is entitled to recover the cattle or their value by action in a Colonial Court if his wife deserts him without just or reasonable cause. In order to decide that question a distinction must be drawn between marriages contracted, or purporting to be contracted, in the Colony proper and those entered into in territories where the solemnities prescribed by our own Statutes are not insisted upon. Our laws relating to marriage are founded in the main upon the civil law, but in course of time there has been considerable departure from it in the mode in which it is contracted, and the consequences flowing from it. The rites and ceremonies observed at a Roman marriage were not deemed essential to its validity, and the marriage might even be contracted without the actual presence of the husband if the wife were taken to his house. The ancient canon law regarded marriage as a sacrament, yet, as remarked by *Burge* (1 Comm., 154), "it still so far respected its natural and civil origin as to consider that where the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest. At the twenty-fourth session of the Council of Trent, the intervention of a priest was required by the Church of Rome, as positively essential to the validity of marriage." He adds that the decrees of this Council were not admitted as of authority in England. Certainly the Dutch law did not insist upon any religious ceremony, and in this respect our own Statutes relating to marriage have followed the Dutch law. But by that law (as well as by our own) certain solemnities were required, without the performance of which the union and cohabitation between the man and woman were not regarded as a marriage but as an illicit intercourse. Since the promulgation of Act No. 16 of 1860, which was passed after the decision of this Court in *Brown v. Fitzbronn's Executors* (8 Searle, 318), the publication of banns or its equivalent has been deemed necessary, whether the marriage takes place before a minister of religion or before a lay marriage officer, except where a special licence has been granted. Provision is made by Act No. 16 of 1860 for the appointment of marriage officers for solemnising the marriage of persons professing the Mohammedan faith according to the Mohammedan customs and usages, but no similar provision exists for marriages according to native customs

* *Ante*, p. 261.

and usages. The only mode in which a valid marriage can be contracted between natives in this colony is before a minister of religion or a lay marriage officer, with previous publication of banns or notice, or failing these by special licence. A union, therefore, founded only upon native usages and customs within the Colony proper is not a marriage, whatever rights may by special legislation have been given to the offspring of such a union in respect of the distribution of the property left by their parents upon their death. In the absence of special legislation recognising such a union as a valid marriage, Courts of law are bound—however much they may regret it—to treat the intercourse, I will as not say immoral, but as illicit. Such was the view of the Supreme Court in *Nanto v. Malgass* (5 Jut., 108), and of the Eastern Districts Court in *Malgass v. Gakavu* (5 E.D.O., 225). Any promise, therefore, made in consideration of such future cohabitation cannot be enforced, and any money paid to either party, or to third persons, cannot be recovered back by reason merely of the failure of such consideration. It follows that if, by native custom, "dowry" cattle are paid to the woman's father on condition that upon her refusing to cohabit with the man any longer, the latter shall be entitled to claim the cattle from the father, the claim cannot be enforced by our Courts. In law there is a *par delictum*, and the claimant cannot prevail over the possessor. Different considerations however arise if the alleged marriage has been contracted at a place where our own solemnities are not regarded as essential to the validity of the marriage. It is a universally accepted principle that the question whether a valid marriage was contracted must be decided according to the law of the place where it was celebrated. *Voet* (28, 2, 4), whilst admitting the general principle, claims the right for every State to refuse recognition of marriages entered into by its own subjects in other countries with the view of avoiding the publicity required by the law of their own country; but this exception, even if maintainable, does not affect the present case. Another important exception, which is relevant to the present inquiry, arises where the marriage is entirely opposed to the policy and institutions of the country which is asked to recognise it. A marriage, for instance, which is incestuous by reason of the near blood relationship of the parties, or which is founded upon polygamy, would not necessarily be recognised in other countries, although it might be warranted by the Municipal law of the country in which it was contracted. But no State would refuse to recognise a marriage contracted in another place by persons there domiciled according to the solemnities of that place, merely

because those solemnities are different from those prescribed by such State. Any marriage, therefore, which would be regarded as valid in any of the dependencies of this colony must be regarded as valid in this colony, although our own solemnities may not have been observed, provided that it is not opposed to the essential nature of the contract as understood in this colony. This last proviso is an important one. If Kafir customs in Tembuland recognise the marriage between a brother and sister, or a polygamous marriage, this Court would not give effect to such marriage although contracted between persons there domiciled. In any question, therefore, for the recovery in a Colonial Court of "dowry" cattle given in celebration of a marriage in the dependencies already mentioned the questions must be whether the marriage was valid according to the law of that dependency, and whether the recognition of such marriage would be consistent with the essential nature of the contract as understood here. If these questions can be answered in the affirmative, I see no reason why a husband whose wife has deserted him without just cause should not recover back the "dowry" cattle or their value from her father. The present case is an appeal from the Court of the Resident Magistrate for Glen Grey in an action brought against a Tembu residing in that district for the recovery of six head of cattle (or their value), which had been delivered to him in the district of St. Mark's, Tembuland. The summons alleges that the plaintiff is a Tembu, and was married in September, 1884, to the defendant's daughter at St. Mark's according to Tembu law and custom, that the cattle were duly delivered to the defendant, that three years afterwards the plaintiff's wife without just cause deserted him, and that according to the Tembu law and custom, upon the faith of which the cattle had been delivered to the defendant, the plaintiff is now entitled to recover it back from the defendant. Before pleading, the defendant's agent excepted to the summons on the grounds that the contract of marriage, according to the Tembu law and customs, is an immoral one, and therefore void *ab initio*, and that as this action arises out of such contract it cannot be maintained in our Courts. In answer to the exception, the plaintiff stated that he could not, in view of recent decisions of the Eastern Districts Court, hope to succeed, but requested that evidence might be taken especially in regard to the custom. The Magistrate sustained the exception, but allowed evidence in support of the plaintiff's case to be given. From that evidence I am satisfied that there is an implied undertaking on the part of the father, whose daughter is married according to Tembu custom, to restore the cattle given to him in celebration of the marriage, in case his daughter should without

just cause desert her husband, during the lifetime of the latter at all events. It follows therefore that if the marriage was valid by the law in force in Tembuland, and was not a polygamous one in the sense that the plaintiff then had a wife alive, he is entitled to succeed in the action unless the defendant can prove that the desertion was for just cause. Cruelty would certainly be just cause, as was decided by the Eastern Districts Courts in *Kobeni v. Matyoro* (5 E.D.C., 89). The husband's cohabiting with another woman either as wife or as concubine would also be just cause; for whatever customs the natives may have, no Court in the Colony proper can, without special legislation to that effect, recognise customs which are inconsistent with the very essence of the conjugal union. The implied promise made by spouses on their marriage, as understood in this colony, is to cohabit with each other alone, and any custom which binds the one spouse to continue such cohabitation after the other has broken his promise is utterly at variance with the nature of the contract. No evidence was tendered as to the reason why the defendant's daughter deserted her husband. The Magistrate, following as he supposed the decisions of the Eastern Districts Court, allowed the exception. In my opinion none of the reported cases decided in the Eastern Districts Court support the exception. The case to which we have been referred as supporting it is that of *Nhono v. Manozweni* (5 E.D.C., 62), but that was an appeal from Tembuland and not from a Court of the Colony proper. Moreover, that was a case in which, after the death of the husband, his surviving brother claimed restoration of the cattle from the wife's father upon her deserting her husband's kraal. The Court refused to recognise a custom under which the wife would, after her husband's death, be bound to remain under the guardianship of his brother and continue to serve his family. The parties had been married after the date of the Proclamation and the decision cannot assist the Court in regard to marriages contracted, as the one now in question was, before the date of the Proclamation. The case, however, deserves careful consideration on account of the very able and interesting judgments which were delivered by each of the judges of the Eastern Districts Court. It is important, especially as bearing upon the question whether, under any circumstances, a marriage contracted in Tembuland possesses such validity there as to be capable of recognition here, and this is the next question which I proceed to consider. In my opinion, the effect of the Proclamation, No. 140 of 1885, is to dispense with the solemnities required by the laws of the Colony proper in the case of natives electing to

marry in Tembuland according to their own customs. If they so elect, they may either register the marriage or leave it unregistered. If they register the marriage it has the same effect as marriages contracted under the law of the Colony. If they do not register the marriage it remains valid, but its effect must be judged by the native customs of the territory, so far as those customs are consistent with the nature of the marriage union. It is not inconsistent with such unions that the wife's father should receive, as a necessary ingredient of its celebration, a certain number of cattle to be restored by him to the husband in the case of the wife deserting the latter without just cause, or that the children of a subsequent marriage, even if entered into during the subsistence of the first, should enjoy rights of inheritance from their father's estate. The proclamation directs that only first marriages shall be registered, but it does not specially recognise the validity of subsequent marriages during the subsistence of the first. In the absence of such special recognition, I am of opinion that such subsequent marriages cannot be regarded as valid. The case with which the Court has now to deal arises out of a marriage contracted in Tembuland, before the date of the proclamation, between natives then residing there. If the action had been brought in a Tembuland court the magistrate would have been justified in giving full effect to the native law, even to the extent of recognising a polygamous marriage. The Proclamation cannot be construed as having a retroactive effect, so as to deprive natives of rights acquired before its promulgation, so far as these rights do not sanction force, fraud, or the disturbance of the peace. Accordingly, in the case of *Dantile v. M'Terara* (9 Juta, 462), this Court affirmed the judgment of the Magistrate of St. Mark's awarding damages to a native, married before the proclamation to a sixth wife during the lifetime of the other wives, against another native who had committed adultery with such sixth wife. It does not follow, however, that the judgment would have been affirmed if the appeal had been from a magistrate of the Colony proper. The Courts of this colony must administer the laws of this colony just as the Courts of Tembuland must administer the laws of that dependency. In an appeal from that dependency against a decision involving a question of native law, this Court has to ascertain what that law is and decide accordingly. When the appeal is from a Colonial Court, this Court can only administer the law of this colony, but for that purpose it may become necessary to give effect to the laws of other countries or dependencies, so far as they affect the status of the parties to the suit, the validity of

any contracts entered into by them, or the effect of such contracts upon their property. But as I before observed, this Court is not bound to give effect to such laws if their application would be opposed to good morals as understood in this colony. The Proclamation recognises polygamous marriages entered into in Tembuland before its promulgation, and therefore, if this case had been tried before the Magistrate of St. Mark's, it would not have been necessary for him to inquire whether the marriage was a polygamous one or not. But the suit was instituted in a Colonial Court against a native no longer resident in Tembuland, and, therefore, the question whether the marriage was a polygamous one or not will be essential for the proper decision of the case. If the plaintiff in the present case had a wife living at the time when he married the defendant's daughter his union with her cannot be regarded, in a suit instituted in the Colony proper, as a valid marriage. Or, if being lawfully married to the defendant's daughter, the plaintiff afterwards took another woman as a wife or concubine, then the first wife would have just cause for deserting her husband, and the "dowry" cattle could not be recovered from her father. The result is that, in our opinion: (1) The Courts of Tembuland may, where all the parties to a suit are natives, recognise the validity of all marriages between natives celebrated according to native law before the promulgation of the Proclamation, whether they be polygamous or not, and such Courts must decide questions of divorce or separation arising between natives so married in conformity with native law and custom, but the Courts of the Colony proper cannot recognise as valid any marriage entered into by a man who had one or more wives living at the time. (2) Neither the Courts of the Colony nor those of Tembuland can recognise as valid any marriage celebrated after the date of the Proclamation with a man who had one or more wives living at the time. If a marriage between an unmarried man and woman has been celebrated according to native law and duly registered thereafter, the effect upon the parties and their issue and property is the same as if the marriage had been contracted according to the laws of the Colony. If such last-mentioned marriage has not been duly registered the marriage is valid, and any questions of divorce or separation arising in the Tembuland Courts between the parties themselves must be decided according to the Colonial law, but the effect of the marriage in other respects upon the parties and their issue and property must be decided according to native law. (8) Neither the Courts of this colony nor those of Tembuland can recognise the right of the husband whose wife has deserted him to take by fraud or violence the so-called "dowry cattle"

while in the peaceable possession of the wife's father. (4) Such cattle or their value may be recovered by the husband by due process of law in the Courts of Tembuland if the wife has deserted her husband without just cause. If the marriage took place before the date of the Proclamation it would make no difference that the marriage was polygamous, but if the marriage took place after the proclamation, the right of a husband who at the time of such marriage had a wife living, or who after such marriage took another wife, would not be recognised. (5) The Courts of this colony cannot recognise the validity of any marriage celebrated in this colony according to native customs without the solemnities required by Statute, and therefore the husband so married cannot on desertion by his wife reclaim the "dowry" cattle from her father. (6) The Courts of this colony will, however, recognise the validity of a marriage celebrated in Tembuland according to native law and custom between two unmarried natives. "Dowry" cattle delivered to celebrate such a marriage may be reclaimed from the father of the wife if he is domiciled in this colony, and the wife deserts her husband without just cause. Cruelty or a subsequent polygamous marriage would be considered to be just cause. The decision of the Magistrate of Glen Grey that marriage in Tembuland according to Tembu laws is necessarily immoral cannot be sustained. The appeal must therefore be allowed, with costs of appeal, and the case must be remitted back to the Magistrate to be decided on its merits. If the plaintiff had not a wife living at the time of his marriage to the defendant's daughter and if she was not justified in deserting him by reason of his taking a second wife or for some other just cause, the plaintiff will be entitled to succeed on the merits.

Mr. Justice Buchanan concurred, and added that the decision given by the Court in this case in no way conflicted with the decisions of the Eastern Districts Court in *Kobeni's* or *Nbono's* case.

Mr. Justice Upington also concurred, and said that the matter was one of great importance, and well deserved the elaborate judgment delivered by his lordship.

[Appellant's Attorneys, Messrs. Findlay & Tait.]

REGINA V. LEHMAN AND MAUSS. { 1893.
Dec. 12th.

Aunt Sally show—Licence to keep—Stamp Acts—Conviction quashed on review.

It is not necessary to take out a licence in connection with what is commonly understood as an Aunt Sally show at which small prizes are awarded to successful competitors.

Mr. Justice Buchanan said this case had come before him on review from the Resident Magistrate of George.

The accused were charged with contravening schedule 15 of the Stamp Act of 1884, as amended by schedule 2 of the Stamp Amendment Act, 1897, in that upon or about the 24th day of November, 1893, and at or near George, the accused did wrongfully and unlawfully sell, offer, or expose for sale or exchange certain goods, wares, or merchandise not being the produce of South Africa, without having the licence so to do required by law.

The evidence went to show that the accused were the proprietors of what is generally known as an "Aunt Sally" show, and those who succeeded in hitting the "Aunt Sally" obtained certain goods, such as pipes, bottles of scent, &c.

The accused were found guilty and sentenced to pay a fine of £5, and in default of payment to be imprisoned for two months.

Mr. Justice Buchanan remarked that the papers had been referred to the Attorney-General, who was not prepared to support the conviction, which would accordingly be quashed, as it was unnecessary to take out a licence in connection with such a show.

PROVISIONAL ROLL.

SOUTH AFRICAN MUTUAL LIFE
ASSURANCE SOCIETY V. VAN
HEERDEN. { 1893.
Dec. 12th.

Mr. Watermeyer moved for provisional sentence for the sum of £3,000 on a mortgage bond, less £25 10s on account.

The order was granted.

DE KOCK'S EXECUTORS V. VLOK.

Mr. Graham moved for provisional sentence for the sum of £500 on a mortgage bond.

The order was granted.

MARKHAM V. MURRAY.

Mr. Shippard moved for provisional sentence for the sum of £15 5s, goods sold and delivered.

Granted.

ADMISSION.

Ex parte KLOSSER.

On the motion of Mr. Watermeyer, Mr. Herman Klosser was duly admitted as a translator in the English and Dutch languages.

REHABILITATIONS.

On motions from the Bar the following rehabilitations were granted: Jephtha Carelse,

Carol Pieter van Wijk Fourie, Maria Elizabeth Viljoen (surviving spouse of Christoffel Johannes Viljoen), James Edward Anderton and Frank Anderton.

GENERAL MOTIONS.

STREAK V. STREAK.

Mr. Buchanan moved for leave for the petitioner (Hannah M. Streak) to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce.

The order was granted, the citation to be returnable on Thursday, February 15, 1894, and personal service to be effected on the husband, who was now alleged to be residing at Vryburg.

Ex parte STRYDOM. { 1893.
Dec. 12th.

Curator ad litem.

The Court appointed a curator ad litem to a woman fifty-six years of age who had been born deaf and dumb and who was about to institute an action for the recovery of the amount of a promissory note alleged to be prescribed.

Petition of Stephanus Petrus Johannes Strydom, of Klipkop, district of Wodehouse

The petitioner is the paternal uncle of Maria Susanna Strydom, who is fifty-six years of age, who is deaf and dumb, and has been so from birth.

Both the parents of the said Maria S. Strydom are dead, and since December, 1892, she has been under the care and protection of the petitioner.

From the year 1878 till December, 1892, the petitioner's niece was under the care and charge of one Jacobs and his wife, both now deceased.

In the year 1876, while she was under their care, the sum of £100 was paid to Jacobs out of the estate of her parents to hold in trust for her.

Subsequently in the year 1880, and after the death of Jacobs, his surviving spouse gave a promissory note or acknowledgment of debt for the said sum of £100.

The executors of Mrs. Jacobs's estate now refuse to pay the £100, on the grounds that the promissory note has become prescribed.

The petitioner alleged that he had been advised that as his niece was not capable of managing her affairs, prescription would not run, and was therefore desirous of bringing an action in the interests of his niece for the recovery of the said sum of £100 with interest.

The petitioner prayed that he, or some other person, might be appointed *curator ad litem* for the purposes above mentioned, and for such other purposes as might be necessary to protect and secure the interests of the said Maria Susanna Strydom.

Mr. Shell was heard in support of the petition.

The Court granted the order in terms of the prayer, and appointed the petitioner *curator ad litem*.

The Chief Justice remarked that it was for the defendants to raise the question as to the petitioner's giving security for costs.

[Petitioner's Attorneys, Messrs. Sauer & Standen.]

WHINNEY, N.O. V. GARDINER, N.O. { 1891.
Dec. 12th.

Mr. Searle moved for leave to appeal to Her Majesty in her Privy Council from the judgment of this Court in the matter between the parties, and for an order restraining the sale of the assets of the company pending such appeal.

Mr. Rose-Innes, Q.C., appeared for the respondent, and opposed the latter portion, of the application on the ground that the sale of the assets of the company would thereby be indefinitely delayed. The present application practically asked the Court to reverse its previous decision.

Mr. Searle submitted that the respondents would run no risk if the applicant could find substantial security for the respondent's claim.

The Court granted leave to appeal in the usual way, but refused the latter part of the application on the grounds that if any application was made for the stay of the sale it should be made to the High Court of Griqualand, which had the administration of the company in its hands. The applicant to bear the costs of the present opposition.

Re ALIWAL NORTH BOARD OF EXECUTORS, IN LIQUIDATION.

Mr. Molteno presented the report of the official liquidator of the above company.

PETITION OF THE KERKERAAD OF THE GEREFORMEERDE KERK, BURGHESDORP.

Mr. Shell moved for the attachment *ad fundandam jurisdictionem* of certain lot of ground No. 162, situated in Burghersdorp, in an action about to be instituted by edictal citation by the Kerkeraad of the Gereformeerde Kerk, Burghersdorp, against Karel N. Ootsee for the recovery of the amount of a mortgage bond.

The Court granted the order; personal service to be effected if possible, failing which, one publica-

tion in the "Volkstem" and one in the "Government Gazette," the citation to be returnable on the last day of February, 1894.

WOLFF V. WOLFF.

Mr. Shell moved to make absolute the rule nisi for dissolution of the marriage subsisting between the parties, by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights.

The rule was made absolute, with costs.

Ex parte SHEARD—In re KUPER'S { 1893.
ESTATE. { Dec. 12th.

Curator bonis — Insolvency — Wasting of assets.

Where a provisional order for the sequestration of an estate as insolvent had been granted, and there was evidence that the assets of the estate were being wasted the Master was authorised to appoint a *curator bonis* pending the appointment of a trustee.

This matter was before the Court on the 5th instant, but no order was made.

The petitioner Francis John Sheard, partner of the firm of Hudson, Vreede & Co., of Mossel Bay, alleged that he had signed a petition to be presented to the Court to have the estate of one Meyer Kuper, shopkeeper, of Klipdrift, district of George, placed under sequestration provisionally. That he had been informed that the said Meyer Kuper and his clerk had been arrested for forgery.

That Meyer's estate consisted of stock in-trade requisite for a country business, horses, ostriches, &c., &c.

That it would be in the interest of all creditors to have a *curator bonis* appointed to carry on the said business, with power to sell such articles as he might think necessary, and to look after the live-stock.

That Alfred Spencer Hall, attorney-at-law, of George, was a fit and proper person to be appointed as such *curator bonis* of the said estate.

The prayer was for an order appointing Mr. Hall *curator bonis* until such time as a trustee could be elected by the creditors, and with powers forthwith to sell such articles as he might think necessary.

The petitioner's attorney also filed an affidavit in which he alleged that he had on the 5th December, 1893, on behalf of Hudson, Vreede & Co., obtained an order for the provisional sequestration of Kuper's estate, which order was returnable on 12th January, 1894; that he had applied to the Master's Office to have Mr. Hall appointed *curator bonis* until such time as a trustee could be elected,

That he was informed by the Chief Clerk that the Master of the Supreme Court was away from office through ill-health, and that no Acting Master had been appointed, and was thus unable to meet the request for the above appointment.

That deponent was thus compelled to make this application to the Court.

Mr. Graham was now heard in support of the application, and read a further affidavit from the applicant's attorney, in which he alleged *inter alia* that after the provisional order had been granted he applied to the Master for the appointment of Hall as *curator bonis*, but that the Master had declined to make such an appointment on the ground that he had no authority to do so.

Deponent further alleged that such appointments were made by the late Master, and that although the present Master declined to appoint a *curator bonis*, he was quite willing that a provisional trustee should be appointed, and that therefore he (deponent), on behalf of his clients, and to save further delay, was willing to accept Hall as provisional trustee instead of *curator bonis*, if the Court would sanction such an appointment.

The applicant filed a further affidavit, in which he alleged that the assets of the estate were unprotected, and were being dissipated by Kuper's wife and brother.

The Court ordered that if it were proved to the satisfaction of the Master of the Supreme Court that the assets of the estate were being wasted as alleged, he would be authorised to appoint a *curator bonis*, this case being his authority for doing so.

[Petitioner's Attorney, D. Tennant, jun.]

SUPREME COURT.

Before Sir J. H. DE VILLIERS, K.C.M.G.,
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

UNION BANK, IN LIQUIDATION { 1898.
v. VOS. { Dec. 18th.

Company—Director—Breach of trust—Compromise sanctioned by Court.

Mr. Rose-Innes, Q.C., moved for the sanction of the Court to the compromise proposed to be effected by the official liquidators with Charles Torriano Vos.

Mr. Searle appeared for Mr. Vos.

Mr. Innes referred to the special report submitted to the Court on November 80 by the liquidators, in which Mr. Vos offered as a compromise for his liabilities in the Union Bank liquidation a cash payment of £4,500, and to relinquish one-half of any refunds which might be made in future on his shares in the Union Bank, on the condition that if the agreement was accepted by the Court it should act as a bar to any action or suit which might be brought by contributories or others, and be considered as a full discharge of all his liabilities as a director of the Union Bank. This offer, continued Mr. Innes, practically gave the liquidators half of Mr. Vos's estate, and the liquidators had decided to recommend this offer to the Court. Throughout the correspondence and negotiations which had taken place in the matter, Mr. Vos had made it a condition that his offer should be a complete settlement, because if he was to be liable to an action by the contributories after paying the large sum he proposed to the liquidators, he would prefer to fight the whole case to the bitter end. The only opposition offered to this compromise was by one contributory, Mr. C. C. de Villiers. With that exception there was no affidavit or appearance on behalf of any of the contributories, and most of them had been consulted by the liquidators. Mr. De Villiers was not represented by counsel, but had filed an affidavit. Mr. Innes then read the affidavit, in which Mr. De Villiers objected to the amount proposed to be paid by Mr. Vos on the grounds that it was not half of his estate, which had been considerably undervalued. The liquidators filed an answering affidavit to that of Mr. De Villiers, maintaining their valuation of the estate.

In reply to Mr. Justice Buchanan,

Mr. Innes said that the liquidators were prepared to pay the costs of the action instituted by Mr. De Villiers against Vos.

Mr. Justice Buchanan: Mr. De Villiers' position seems to be based on the ground that Mr. Vos offered one-half of his estate, and that the amount offered did not represent one-half.

Mr. Innes pointed out that Mr. Vos did not intend in the first instance to offer a mathematical half of his estate; that his first offer was £2,500, but that during the negotiations connected with subsequent offers the amount finally reached practically half the value of the estate.

Mr. Justice Upington said his difficulty was that contributories should have paid, many of them, 20s. in the £, and that one of the directors, against whom a breach of trust was alleged, should be allowed to compromise in this way.

Mr. Innes said Mr. Vos had already paid £5,000 in calls, which, with the £4,500, would be a sufficient punishment for whatever breach of trust he had committed.

Mr. Searle said that Mr. Vos as a director of the bank never speculated in gold shares, or had an overdraft or anything of that kind, so that his position was somewhat different from that of the other directors. Mr. Vos, shortly before the bank stopped payment, sold the bulk of his shares in it, but he did not think the bank lost anything by that sale.

Mr. Innes said that over £18,000 had been paid in calls on the shares which Mr. Vos had sold, which was more than the entire amount of Mr. Vos's estate.

Mr. Rose-Innes, Q.C., in support of the proposed compromise, relied mainly on section 44 of Act 12 of 1868.

The Court sanctioned the compromise.

The Chief Justice said : By order of this Court due notice has been given for the information of all concerned that on the 12th December an application would be made to the Court for judgment against the defendant Vos by consent, in terms of a compromise arranged between the parties to the suit. The terms of the compromise were embodied in the liquidators' report and were as follows : The defendant Vos proposes first of all to pay a cash payment of £4,500 ; secondly, Mr. Vos is to relinquish one-half of any refunds which may be made in the future on his shares in the Union Bank ; thirdly, if these terms be accepted by the Court, they shall operate as a bar to any action or suit which may be brought by any shareholder or others, and be a full discharge of all liabilities in respect of his action as a director of the said bank. Now, I must confess, that if any contributory who had paid his contributions in full had appeared to-day to object to this compromise being sanctioned, I should have felt great difficulty in consenting to it, because although the terms of the 44th section are wide enough in my opinion to include any compromise of a debt or liability under the 47th section, yet, if a contributory who had paid in full had stated to the Court that he objected to the compromise, and that he was prepared to proceed with any action which he had already commenced against the defendant, it would not, in my opinion, have been just to have deprived him of the fruits of his action by sanctioning such a compromise. That is not, however, what has taken place in the present case. A contributory who has paid in full has filed an affidavit, which the liquidators presented to this Court, and in that affidavit he does not state that he intends proceeding with this action, but his main objection is as to the amount which is intended to be accepted by the liquidators. Well, that being so, the Court has only to inquire whether the amount offered is one which, under the circumstances, ought to be accepted. Still I

cannot lose sight of the fact that the suggestion that some compromise should be arrived at really came from the Court. No doubt the Court considered it would be for the interest of all parties concerned, which would include the contributories, still, as the suggestion came from the Court, I think the liquidators were justified in entering into negotiations for the purpose of effecting this compromise, and I believe myself, that as matters now stand it is really for the interest of the contributories to accept the compromise. Of course it is possible that by proceeding to extremities more might be obtained from Mr. Vos, but on the other hand all the facts are not before the liquidators, and it is quite possible that there might be facts known to the defendant Vos which might possibly relieve him from liability. At all events, there is always a certain degree of uncertainty in litigation, and if a substantial amount like this can be obtained for the shareholders, I think the Court, looking to the interests of all parties concerned, is justified in saying that this amount shall be accepted under all the circumstances. Therefore, seeing that the 44th section is so wide as to include all liabilities to the company, and to include such liabilities as are contemplated by the 47th section, the Court is of opinion that this compromise may be sanctioned. The Court will accordingly give that sanction.

Mr. Justice Buchanan, in concurring, remarked that as the amount had been recovered for the liquidation mainly through Mr. De Villiers, who instituted the action against Vos, which had been stopped by the liquidators commencing their action, it was only fair to Mr. De Villiers that all his costs should be paid by the liquidators.

Mr. Justice Upington also concurred, but added that if Mr. De Villiers had appeared that day and shown very slight ground indeed, he would have declined to give his sanction to the compromise.

[Attorneys for the Liquidators, Messrs. Sauer & Standen ; Attorneys for Vos, Messrs. J. & H. Reid & Nephew.]

Re PROTECTOR FIRE ASSURANCE } 1893.
COMPANY IN LIQUIDATION. } Dec. 13th

On 18th August, 1862, one Rosenkrans passed a mortgage bond for £200 in favour of the president of the company, whereby two water erren in the village of Robertson were hypothecated. The liquidators of the company alleged that the bond had been lost or mislaid, and could not be found, nor did it appear from the books of the company that it had been pledged. That the petitioners had disposed of the claim against Rosenkrans, and were now desirous of ceding the bond to the pur-

chaser. The prayer was for an order authorising the Registrar of Deeds, to issue a certified copy of the bond.

Mr. Maskew was heard in support of the application.

The Court granted the order as prayed.

REGINA V. WILLIAM JOSE. { 189.
Dec. 18th

Theft of horses—Possession—Conviction—sustained, on appeal.

Appeal from the conviction of the appellant by the Assistant Resident Magistrate of Namaqualand on a charge of horse-stealing.

The appellant and one Allen were charged with the crime of theft, in that, upon or about the 19th day of June, 1898, and at or near Steinkopf, in the district of Namaqualand, the accused did wrongfully and unlawfully steal two horses, the property of Leopold George Brecher, there residing. The case against Jose was remitted by the Attorney-General to be tried by the Magistrate under Act 48 of 1885. On the 10th November, 1898, the prisoner was arraigned under section 29 of Act 8 of 1861, and pleaded not guilty. The prisoner admitted the possession of the horses, but alleged that he had bought them for £10 from two Damaras at a place about half a day's ride from Pella. The accused was found guilty and sentenced to ten months' imprisonment with hard labour. From this sentence the present appeal was brought.

The facts appear from the judgment.

Mr. Rose-Innes, Q.C., was heard in support of the appeal.

Mr. Schreiner, Q.C., A.G., for the Crown, was not called upon.

The Court dismissed the appeal.

The Chief Justice said it was clear from the evidence given at a later stage before the Assistant Resident Magistrate of Namaqualand that the two horses which had been found in the possession of the prisoner were the horses which had been stolen from Brecher, and it therefore lay on the prisoner to give a satisfactory explanation as to how he came into possession of those horses which had been recently stolen. The explanation given by him was really that he was not at Brecher's place at the time those horses were stolen, but that three days afterwards he met a Kafir in some place north of that spot, and bought the horses from him. Now, as to the *alibi*, it seemed to him (the Chief Justice) that the evidence was very vague. Not one of the witnesses gave evidence to show that the prisoner was at Tweefontein on that particular night, so that the attempted *alibi* did not rebut the evidence arising from the

possession. The prisoner said he bought the horses from a Kafir, and that he paid £10 for them. There was no satisfactory evidence to shew that the prisoner had £10 in his possession at the time. He said he was going to look for work at Walfish Bay. It seemed an unlikely story that a man having £10 in his possession, and being unable to get work in this colony, would go roaming about through that wretched country on a bare chance of getting work on a railway which he had no proof was being constructed. On the other hand, if he stole the horses, it was most likely that he would go to a place where traders were likely to be, and where he could exchange the horses for cattle, with which he could go back to the Colony. If the case had come before a jury some juries might have acquitted, but if a jury had convicted no presiding judge would have disagreed with them. He thought they ought not to disturb the Magistrate's sentence. The appeal would therefore be dismissed.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinué.]

SUPREME COURT.

Before Sir J. H. DE VILLIERS, K.C.M.G.,
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

CAMPBELL, N.O. V. GREEN. { 1898.
Dec. 14th.

Costs — Resident Magistrate — Judicial discretion.

Appeal from a judgment of the Resident Magistrate of Herschel in an action in which the present appellant, in his capacity as father and natural guardian of his two minor daughters, sued the respondent, in his capacity as trustee in the insolvent estate of the appellant, and also the respondent's wife, for the recovery of three cows and three calves, or their value, £20.

The summons alleged that on or about 21st November, 1892, the defendants, one or other or both of them, wrongfully and unlawfully seized or possessed themselves of certain three cows, of the value of £15 or thereabouts, the *bona-fide* property of the plaintiff's minor daughters.

Further, that while the said three cows were in the possession of the defendants, or one or other or both of them, the said three cows each calved,

that the three calves were still living, and were wrongfully and unlawfully in the possession of the defendants, and were of the value of £5.

The plaintiff prayed that the defendants might be adjudged to restore to him, in his capacity as aforesaid, the said three cows and three calves, or to pay the sum of £20, their value, with costs of suit.

The defendants excepted to the summons on the grounds:

1. That Mr. Green should not have been sued by the plaintiff, as the three cows in question were duly handed by Mrs. Green to her husband as trustee in the plaintiff's insolvent estate.

2. That the said cattle, after having been handed to the trustee, were duly advertised and subsequently sold by auction by the trustee for the benefit of the estate, and came into the hands of the defendant, Mrs. Green, by purchase at the said sale.

3. The plaintiff being an uncertificated insolvent, should be ordered to give security for costs before proceeding with the case.

The first two exceptions were treated by the Magistrate as pleas. He disallowed the third exception on the grounds that no authority had been shown that the Resident Magistrate's Court had the power to make the order asked for; and further, that if the case on behalf of the minors were good it would be hard that it could not be brought owing to the plaintiff's failure to find security.

The trustee in his plea denied all liability, and specially pleaded that he was appointed trustee in the plaintiff's insolvent estate. That after receiving his appointment he discovered that certain breeding cattle belonging to the insolvent were in the possession of the other defendant (Mrs. Green), amongst which were the three cows and three calves now sued for. That he demanded these cattle from Mrs. Green, and in his aforesaid capacity had them sold for the benefit of the estate by public auction.

The facts are briefly these:

In May, 1891, the plaintiff hired from Mrs. Green (who is married without community) a portion of her farm for a period of eighteen months at a rent of £80 a year. He had over forty head of cattle on the farm. Whilst he was in occupation of the farm he borrowed £67 odd from Green, who lent the money on behalf of his wife, on the security, as the defendant alleged, of his (plaintiff's) cattle. This, however, was denied by the plaintiff, who stated that no security had been given for the loan. At the date of his surrendering his estate (November, 1892), the plaintiff owed Mrs. Green £45, being eighteen months' rent of the farm, in addition to the loan above referred to. To secure herself Mrs. Green took possession

of the plaintiff's cattle, but afterwards gave them up to the trustee on receiving a guarantee of payment. All the cattle, with the exception of the three cows, the subject of the present action, were retaken by the plaintiff, who alleged that they were the property of his two minor daughters, and were the progeny of four cows given them in 1884. Subsequently one of the cows died whilst in the possession of the trustee, and the remaining two cows and three calves were sold by auction on account of the estate, and bought by Mrs. Green. The Magistrate found that the cows and calves were the property of the plaintiff's children, and gave judgment for their restoration or payment of £10, and for £4 the value of the cow that died. Judgment was given against both defendants, the one paying the other to be absolved, but no order was made as to costs.

The Magistrate stated in his reasons that there was clear proof that the cattle belonged to the children, but that considering the shabby manner in which the plaintiff had acted towards the Greens he considered it only fair to give no order as to costs. From so much of the Magistrate's judgment as referred to the question of costs the plaintiff now appealed.

Mr. Buchanan was heard in support of the appeal, and contended that although costs were in the discretion of the Magistrate, still his discretion must be judicial, that is based on some legal principle, otherwise his decision may be reversed. *Van der Berg v. Gebhard* (1 Menz., 407), *Kirsten v. Van Noorden* (Buch., 1879, p. 233), *Adams v. Sparks* (2 Sheil, 100). In the present case there was no reason for departing from the general rule that costs follow the result. The "shabby" conduct of Campbell could not render his minor children liable for costs.

Mr. Molteno, for the respondents: All the difficulties sprung from the Resident Magistrate's refusal to order the plaintiff to find security for costs—*Van der Walt v. Hudson and Moore* (4 Juta, 265). There was no use in appealing from the Resident Magistrate's judgment, as the plaintiff was insolvent. The judgment was wrong. The father had the administration of his children's property, but he could not, as in the present case, raise money on the security of that property and then turn round and to say it was his children's—*Van Rooyen v. Werner* (9 Juta, 429; 2 Sheil, 296), *Steyn v. Steyn's Trustees* (8 Sheil, 185 and 825), *In re Knoop* (8 Sheil, 247). Campbell sued without leave of the Court. He sued at his own risk, and could not prejudice the minors; therefore his con-

* See also *Dodds v. Baray* (Buch. 1874 p. 41).
Van Wyk v. Faber (2 E.D.C. 153).
Bennet & Webster v. Coetsee (1 Juta, 285).
Van Rooyen v. Klerck. (2 Juta, 149).
Umhlongo v. Umgando (6 E.D.C. 211). Rep.

duct is to be considered personally. As to the liability of a successful suitor to pay costs where his agents had been guilty of negligence, see *Liquidators Union Bank v. Beit* (9 Jute, 144; 2 Shell, 67). The Magistrate's decision on the question of costs should not be disturbed.

Mr. Buchanan in reply.

The Court dismissed the appeal with costs.

The Chief Justice said: The counsel for the appellants is quite correct in urging upon the Court that the question of costs is in the Magistrate's discretion, but that he should exercise a judicial discretion—he should give sound reasons for withholding costs from a successful plaintiff, as in this action. In the present case, if Mr. Campbell himself had sued the defendants I think the Magistrate would have been quite justified, on account of Campbell's previous conduct throughout these transactions, in withholding costs from him, although giving him judgment. In this case the only question is whether the fact that Campbell was suing on behalf of his minor children ought to have any influence on our decision. Considering the very large powers of administration which a father has over the property of his children, I think it would be very injudicious indeed to hold that the children are not to be placed on the same footing in an action of this kind as the father himself would have been. Throughout these transactions between Mrs. Green and Campbell the cattle were held out as being the property of Campbell himself. That is the evidence of Mrs. Green herself, and the Magistrate in his reasons for his decision says that Mrs. Green had no reason to believe that the cattle were those of the children, and I think he might have added that from all the information received by Mrs. Green from Campbell she had every reason to believe that the cattle belonged to Campbell and not to the children. Under these circumstances, I think the Magistrate was quite justified in considering the conduct of Campbell throughout as representing his children in these transactions, and in withholding costs from the plaintiffs although they were successful in this action. At all events, I am not prepared to say that the Magistrate has not exercised a judicial discretion. It is for the appellants to show that the decision is wholly wrong, and in my opinion they have not succeeded in doing this. The appeal must therefore be dismissed with costs.

Their lordship concurred.

[Appellant's Attorneys, Messrs. Scanlen Syfret; Respondent's Attorneys, Messrs. Sauer & Standen.]

SUPREME COURT.

(IN CHAMBERS.)

[Before Mr. Justice BUCHANAN and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte MARAIS.

{ 1898.
Dec. 19th.

On the motion of Mr. Watermeyer, Mr. David François Marais was admitted as a notary.

LONDON AND SOUTH AFRICAN EXPLORATION
COMPANY V. DE BEERS MINES.

Mr. Currey moved for leave to appeal to Her Majesty in her Privy Council from the judgment of this Court in the matter between the parties.

The order was granted.

Ex parte RHODA.

{ 1898.
Dec. 19th.

Letters of administration—Mutual will—
Error in testator's name—Master.

One Rhoda, who could neither read nor write, together with his wife executed a mutual will, which after execution was placed in a closed envelope, in which it remained until after Rhoda's death, when it was opened, and on the will being read it was discovered that the testators' names appeared in the body of the will as Rorich, which name also appeared below Rhoda's mark at the foot of the will, although his wife had signed her name correctly.

The Court, on being satisfied as to Rhoda's identity, directed the Master to issue letters of administration to the surviving spouse, who had been appointed executor under the will.

This was an application, on notice to the Master, for an order authorising him to grant letters of administration to Rachel Maria Rhoda, (born Stokes), widow of the late Jacobus Rhoda, in terms of the joint will of her late husband and herself, dated 19th May, 1882.

On the 19th May, 1882, the late Jacobus Rhoda and his wife, the petitioner, executed a joint will before a notary in Cape Town.

Jacobus Rhoda died on the 6th November, 1893. On the 11th of November, 1893, the envelope containing the will was opened in the presence of the petitioner by Dr. W. H. Dieperink, J.P., when it was discovered that the name of petitioner's

husband was wrongly inserted underneath his mark as Jacobus Rorich instead of Jacobus Rhoda.

The petitioner alleged that her late husband had never to her knowledge been known by the name of "Rorich," but only by that of Jacobus Rhoda, in which name his fixed property had been registered.

Dr. Dieperink also filed an affidavit in which he alleged that he had been the medical adviser of the deceased and his family for the last twenty-five years, that he had never passed under the name of Rorich, and that in his last illness he had told deponent that some years before he and his wife had executed a mutual will.

Both the testators' names appeared in the body of the will as Rorich, but the petitioner had correctly written her name R. M. Rhoda under her husband's.

Mr. Watermeyer was heard in support of the application.

The Court granted the order as prayed.

[Petitioner's Attorney, C. C. Silberbauer.]

Ex parte ABT AND WIFE. { 1898.
Dec. 16th.
1894.
Jan. 28rd.

Marriage—Post-nuptial contract—Registration.

Where a husband domiciled in the Colony had married in Cassel, in Germany, with the intention of excluding community, but had neglected to execute an ante-nuptial contract before the marriage, being under the belief that after the marriage and on his return to the Colony he could enter into a contract making certain promised settlements on his wife, the Court on being satisfied that the case was bona fide allowed the registration of a post-nuptial contract containing the usual clauses of an ante-nuptial contract.

Mr. Shippard moved for authority to petitioners to enter into a post-nuptial notarial contract, embodying the settlements agreed to be made by the first-named petitioner in consideration of the marriage and containing the usual clauses of an ante-nuptial contract.

The petition showed that the first-named petitioner left this colony in May, 1898, for Cassel, in Germany, for the purpose of marrying the second petitioner Emma Abt, then Emma Mosabaum, being under the belief that he could, on his return to the Colony, enter into a contract making a

settlement upon his wife, and having prior to the marriage promised his wife and her parents to make such a settlement.

At the time of his marriage, and at the present time, the first petitioner was perfectly solvent.

The petitioners were married at Cassel on the 29th August, 1898, upon the distinct understanding that settlements would be made immediately upon arrival in South Africa.

Petitioners arrived at Port Elizabeth on the 20th November, and at once took steps to have the proposed contract drawn up, but were informed that the laws of this colony did not permit of such a contract, hence the present application.

The first-named petitioner was desirous of settling upon his wife: (a) The household furniture and plate, valued at £1,000; (b) a life policy for £1,000, and an undertaking to pay the premiums thereon as they became due; (c) a sum of £2,500 in cash.

Mr. Shippard quoted in support of the application the case of *Steele* (Sheil III., 258), and the case of *Ex parte Fricker and Wife* (Sheil II., 212).

The matter was postponed for further information to be obtained as to the law of Cassel, the wife's means before marriage, and the length of time the first-named petitioner had been resident in the Colony.

The application was renewed on the 28rd January, 1894, and the first-named petitioner filed an affidavit, in which he alleged:

1. That he had resided in the Colony since July, 1881.
2. That it was his full intention to marry without community of property, as at the time of his marriage he was domiciled in this colony, and wished to avoid the consequences of marrying in community of property.
3. That prior to his marriage his wife's parents gave her £1,000 cash, which they believed would remain her own sole property, and which amount the petitioner alleged he was sure they would have paid had he not assured them that he would execute the contract which he then thought it was possible for him to execute on his arrival in this colony.

A letter from the German Consul-General to the attorneys for the petitioners was read, from which it appeared that the law of Cassel is the German common law except as modified by practice or by statute.

Mr. Shippard was heard in support of the application, and relied on *Burge* (Vol. 1, pp. 27, 38, 261).

Mr. Justice Upington: The case appears to be a *bona-fide* one, and under the circumstances the order will be granted, but without prejudice to the rights of creditors to the date of registration.

[Petitioners' Attorneys, Messrs. Van Zyl & Buissinne.]

Ex parte MCLEOD.

1898.
Dec. 19th.
1894.
Jan. 12th.

Executor—Trust—Release.

Where the Court was satisfied that the interests of an executor were in conflict with the interests of the estate of which he was executor he was at his request relieved from his trust.

Petition of Alfred Henry McLeod.

It appeared from the petition that letters of administration as executors testamentary in the estate of the late John James Berry were granted to the petitioner, to Jessie Adelaide Berry, and to Lawrence Giani Byrne on the 11th February, 1892, and that they accepted the trust.

That petitioner acts as the general agent of his mother, who is the executor testamentary of the estate of the late William McLeod, of which estate the petitioner is an heir.

That in carrying out the administration of Berry's estate the petitioner discovered that certain sums of money were due by Berry's estate to that of the late William McLeod's, and that he was not aware of this at the time of his entering upon the trust.

That the debt was in dispute and that petitioner's interests as heir in the estate of the late William McLeod were in conflict with the interests of the estate of the late Berry.

That the petitioner and his co executors were at variance concerning the claim of the estate of the late William McLeod.

That the petitioner and his co-executors had filed a first account of their administration of Berry's estate, and that a second account should at the date of the petition have been filed with the Master, but the petitioner alleged that he could not conscientiously sign the same, as the manner in which the account was sought to be framed was not as he believed correct.

The prayer was that the petitioner might be released from his trust and thereafter from all liability thereunder.

Mr. Watermeyer was heard in support of the application.

The Court ordered the matter to stand over, so that notice might be given to the co-executors.

Notice was duly given and the co-executors filed an answering affidavit.

On the 12th January, 1894, the application was renewed. There was no appearance for the co-executors, and the Court released the petitioner from his trust, but intimated that although nothing would be said in the order about liability it followed as a matter of course that the petitioner would be liable for what he had done during the term of his executorship.

[Petitioner's Attorney, Gus Trollip.]

TTT

SUPREME COURT.

(IN CHAMBERS.)

[Before Mr. Justice BUCHANAN.]

IRVINE V. IRVINE.

1898.
Dec. 27th.

Mr. Currey moved for leave to applicant to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce.

The parties, it appeared, were married at Rondebosch in June, 1886, and after residing at Port Elizabeth and in the Orange Free State the husband finally deserted his wife at Vredeport, near Potchefstroom, in 1889. His present whereabouts was unknown.

The order was granted, and the citation made returnable on the 15th February, personal service to be made if possible, and if not, one publication in the "Gazette" and one in the "Potchefstroom Budget."

APPENDIX.

With reference to *Ruck v. Registrar of Deeds* (8 Sheil, 206), the following Regulation has come into operation since that case was reported. *Rep.*

GOVERNMENT NOTICE.—No. 806, 1893.

*Attorney-General's Office,
Cape Town, 15th August, 1893*

His Excellency the Governor, with the advice of the Executive Council, has been pleased to approve of the substitution of the Regulation hereto appended for Regulation No. 2 appended to Government Notice No. 1,082, of the 10th December, 1891, under the provisions of "The Deeds Registry Act, 1891."

W. P. SCHREINER,
Attorney-General.

The following Regulation shall come into operation in the Deeds Registry Offices, at Cape Town, Kimberley, and King William's Town, on the 1st day of September, 1893:

2. On and after the 1st day of September, 1893 Deeds shall be lodged for examination with the Receiving Clerk between the hours of 10 a.m. and 12 noon on Saturdays, and 11 a.m. and 12.50 p.m. on other working days.

On the expiration of four clear days after such lodgment, and between the same hours, all Deeds, to the passing of which no objection has been found, shall be executed before the Registrar of Deeds (who shall cause the time of its execution to be noted on each Deed), and such Deeds shall thereupon be of full force and effect.

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Bona fide and mala fide possessor—Lessee —Accession to land—Improvements —Ownership — Retention — Compensation — Buildings — Trees — Necessary expenses—Injury to land —Materials annexed to land—Legal hypothec—Damages for injury to soil and for non-repair. (1) A bona fide possessor of land retains his ownership in materials affixed by him to the land until he has parted with the possession. Even after the owner has demanded possession such bona-fide possessor may retain possession until he is compensated for his improvements to the extent of the enhanced value of the land and, failing payment of such compensation, he may remove the	

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materials if he can do so without serious injury to the land, or he may surrender occupation and recover the compensation by action. (2) A male-fide possessor who has affixed materials to the land, and, before demand made by the owner, has disannexed and removed them, is not deemed to have parted with his ownership in the materials. After demand he has no longer the right to retain the land or remove the materials from the land, nor is he entitled to compensation except for such expenditure as he may have necessarily incurred for the protection or preservation of the land. If however the rightful owner has stood by and allowed the erection to proceed without notice of his claim the possessor will have the same rights to retention and compensation as a bona-fide possessor. (3) In the absence of special agreement, a lessee annexing materials, not being growing trees, to the soil is presumed to do so for the sake of temporary and not perpetual use, and, as between himself and the owner of the land, does not, during his tenancy, lose his ownership in the materials. He may, therefore, before the expiration of his term disannex the materials and remove them from the land, subject to the rights of the owner to be secured against any injury to the land and to prevent any depreciation of his hypothecary rights for unpaid rent. At the expiration of the lease, however, the owner of the land becomes the owner of all materials then remaining annexed and even of materials which having been annexed without his consent have been disannexed but not removed by the lessee. The lessee has no right of retention after the expiration of his term but may by action recover the value of	

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the bare materials annexed by him with the consent of the owner, the land itself being subject to a legal hypothec for such compensation when duly assessed.

Improvements necessary for the protection or preservation of the land may not be removed even during the term, but, on the other hand, they must be compensated for.

By deed of lease the plaintiffs leased to the defendants a plot of ground for five years at an annual rental, and stipulated that the lessees should not use it for any other purpose than a slaughter-place, with the necessary buildings for the same, and that they should at the expiration of the term surrender the land to the lessors with all buildings and erections thereon in good repair and condition, with a proviso that, if no rent shall be due and unpaid the lessees shall be at liberty during their tenancy to remove all such improvements (save and except boundary fences) as shall be capable of removal without injury to the land itself.

The tenants having erected certain buildings with stone foundations for a butcher's slaughtering-place removed the whole of such buildings, except the foundations, before the expiration of the term.

Held, reversing the decision of the High Court of Griqualand, that the stipulations in favour of the lessors did not deprive the lessees of their common law right to remove the materials during their tenancy, and that if some damage was in fact done to the land by the foundations being left in the soil, the action should have been for damages for not delivering the land in the condition in which it was delivered to the lessees, instead of for damages for not leaving the buildings erected by themselves in good repair and condition.

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De Beers Consolidated Mines v. L. and S. A. Exploration Company ... 438

Boundary—Transfer deed—Diagram—Road.

Where the diagram attached to a deed of transfer does not conflict with the description of the boundaries given in the body of the deed such diagram affords valuable evidence as to the boundaries of the land transferred.

The owner of land transferred a portion thereof by a deed which described such portion as being bounded on the west by "the remaining extent."

The diagram attached showed the middle of a certain main road as the western boundary, running then where it still runs.

Held, in an action brought by the owner of such portion against the owner of the remaining extent, that the middle of the road was the boundary between the two properties.

Hirsch v. Gill ... 174

Case pending in Supreme Court—Application for removal to High Court refused.

Cohen v. Peach ... 368

Chief Magistrate.

Application for review of proceedings in Chief Magistrate's Court of Griqualand East refused.

Ex-parte Pienaar—In re Godden v. Pienaar ... 120

Child — Marriage — Husband — Interdict.

The Court granted an interdict restraining a husband from interfering with his wife, a child fourteen years old, who alleged on affidavit that she had been compelled by her mother to go through a form of marriage with him in ignorance of what she was doing, pending an action to be brought by her to have the marriage declared null and void.

Ex parte Johnson ... 373

Circuit Court—Case pending—Application for removal to Supreme Court
—No order—*Jeppe v. Steenkamp* 335

Company — Winding-up — Receiver — Official liquidator—Mortgage priority—Debenture-holders—Conflict of jurisdiction—Transaction in one country to be completed in another—Conveyance — Delivery — Registration.

A company registered in England but carrying on a diamond-mining business in this colony executed a deed in England which, after reciting that the company had determined to issue certain debenture stock, to charge the company's mining claims for the due payment of the debentures and interest thereon, to appoint an irrevocable attorney for the purpose of effecting the charge according to the laws of the Colony, and in particular granting a hypothecation of all the mining claims, and a general notarial bond over the property of the company, conveyed all the assets of the Company to certain trustees for the debenture-holders, with power, in case an order be made by a Court having jurisdiction for the winding-up of the company, to take possession of the property, or appoint a receiver and to enforce the security in any way not prohibited by the law of the Colony by sale of the property.

On the application of the debenture-holders the Court of Chancery in England appointed the applicant as receiver of the property comprised in the deed but made no order for the winding-up of the company.

Thereafter the High Court of Griqualand made an order for the winding-up of the company in this colony and appointed the respondent as official liquidator with full powers under the Act.

The respondent having advertised a sale of the assets of the company in the Colony, the applicant applied to

the Griqualand Court (a) for an order recognising him as receiver, with all the powers conferred upon him by the English Court and (b) for an interdict staying the sale to a date thirteen days later than that fixed by the advertisement.

The High Court having dismissed both applications,

Held, on appeal, (a) that so long as the orders of the High Court for winding-up the company and appointing the respondent as liquidator remained in force that Court was justified in refusing to recognize the applicant's claim to the control and possession of the company's assets in this colony, and (b) that no good reason existed for interfering with the discretion of that Court as to the date to be fixed for the sale of the assets.

The deed (although in form a conveyance of the company's assets) contemplating a completion of the security in this colony, cannot be regarded by the Courts of this colony as a transfer of the ownership of the Colonial assets to the trustees without registration of the mortgage of the mining claims and delivery of the movable assets.

The transaction having been registered in the Deeds Office as a mortgage must be treated as such by the Courts of this colony, and the property mortgaged must be realised and distributed by the liquidator of the company (with due regard to the debenture-holders' rights of priority) and not by the receiver appointed in England.

Whinney, N.O., v. Gardiner, N.O. ... 452

2. — Voluntary Winding-up, re Paarl Fruit Preserving Co. ... 343

3. — Trust deed — Alterations — Increase of capital — Registrar of Deeds—Notices—Act 23 of 1861—Act 13 of 1888.

Where it had been resolved at a special

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general meeting of shareholders of a company registered with limited liability under Act 23 of 1861 to alter the name of the company, to increase the capital, and to issue debentures, and notice of the change of name was given to the Registrar of Deeds in terms of Act 13 of 1888 section 2, but no notice of the increase of capital had, through an oversight of the company's attorneys, been given to the Registrar in terms of section 12 of the Act, nor had a copy of the new or supplemental deed of settlement been transmitted to the Registrar within one month as required by section 7 of Act 23 of 1861, the Court on the petition of the directors, and on being satisfied as to their bona fides, authorised the Registrar of Deeds to register the increase of capital and the alterations made to the trust deed, but without prejudice to the rights of creditors, or of the Government to insist upon any fine payable under the Act.	of theft, fraud, and forgery to be struck off the roll, although the Incorporated Law Society had taken no steps in the matter— <i>In re Regina v. Gabriel</i> 268
<i>In re South African Milling Company</i> ... 458	Crown Lands Disposal Act—Purchase in name of minor—Bond—Father and natural guardian. <i>The Court authorised a father, who had bought land under the Crown Lands Disposal Act, 1887, in the names of his minor children, to pass a bond to the Government for the balance of the purchase price as his children's father and natural guardian.</i>
4. — Director — Breach of trust — Compromise sanctioned by Court	<i>Ex parte, Blom</i> 348
Union Bank, in liquidation, v. Vos ... 475	Cruelty to animals — Act 18 of 1888—Section 2—Alleged contravention—Conviction quashed on appeal
COMPANY in liquidation—Preliminary Report under Act 25 of 1892, sections 154 and 155— <i>In re Horo Concession Exploration Company</i> ... 208	<i>Regina v. Pocock</i> 369
CONTRACT—Alleged breach—Sheep—Delivery — Damages — Costs — Appeal— <i>Lipschitz v. Kunne</i> ... 98	1. Costs. <i>Where judgment had been given in an action for a declaration of rights against an executrix testamentary and another defendant, and one-half of the costs were ordered to be paid out of the estate in which the plaintiffs had a reversionary interest, the Court declined to grant an order authorising the executrix testamentary to mortgage the landed property in the estate for the purpose of enabling her to pay her share of the costs.</i>
2. — Services rendered — Remuneration — Action for — <i>Wichua v. Delbridge</i> 79	<i>Ex parte De Villiers—In re Estate of the late Lucas P. Steenkamp</i> ... 122
3. — Railway Refreshment Rooms — Breach — Damages — <i>Logan v. Colonial Government</i> 181	2. — Analyst's fee—Taxation—Review. <i>Application should be made at the trial for any special costs which a successful party wishes to be adjudged to him.</i>
CONTRACT OF SALE—Conditions—Breach — Damages— <i>Louw & Co. v. Laubscher</i> 65	<i>Wynberg Municipality v. Clayton, N.O.</i> 200
Conveyancer — Conviction on criminal charges—Removal from roll. <i>The Court ordered the name of a conveyancer who had been convicted</i>	3. — TAXATION—Review— <i>Logan v. The Colonial Government</i> ... 225
	4. — Taxation—Rule of Court 315, section 12—Review— <i>In re Steenkamp v. De Villiers and Others</i> ... 104
	5. — Resident Magistrate—Judicial discretion — <i>Campbell, N.O., v. Green</i> 477

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CRIMINAL LIBEL—Act 48 of 1882—Innuendo—Exceptions—Special plea of justification—Public interest—Time and manner of publication.

Where, in a criminal prosecution for libel, the words alleged in the indictment to have been used by the defendant are capable of the meaning ascribed to them in the innuendo an exception to the indictment on the ground that the innuendo was not justified by the words used held to be bad.

The alleged libel having been published by means of post-cards addressed to the person libelled and read by members of his family, Held, that a special plea of justification should state the fact or facts by reason of which it was for the public benefit that the matters charged should have been published in that particular manner, and that in the absence of such a statement, an exception to the plea was properly allowed, and evidence in support of the plea properly disallowed, at the trial.

Held further, that if the plea had not been open to the exception it would have been the duty of the presiding judge to leave to the jury the question whether the time and manner of publication were such as to serve the public interest.

Regina v. Hirsch ... 92

Curator ad litem.

The Court appointed a curator ad litem to a woman fifty-six years of age who had been born deaf and dumb and who was about to institute an action for the recovery of the amount of a promissory note alleged to be prescribed.

Ex parte Strydom ... 473

Curator bonis—Appointment—Powers conferred—*Ex parte Smith. In re Roberts's Estate* ... 296

2. — Insolventy — Wasting of assets.

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Where a provisional order for the sequestration of an estate as insolvent had been granted, and there was evidence that the assets of the estate were being wasted the Master was authorised to appoint a curator bonis pending the appointment of a trustee.

Ex parte Sheard—In re Kuper's Estate 474

Damage—Contributory negligence—Statutory duty—Misfeasance—Non-feasance—Municipality—Street.

When a legal duty is imposed upon and undertaken by a public body or individual and no other remedy is expressly provided in case of non-performance, a person who, without contributory negligence, sustains damage by reason of such non-performance, is entitled to recover against the public body or individual, in the absence of proof that the duty was impossible of fulfilment.

A public body which undertakes the construction of any work is liable for damages occasioned by its misfeasance whether the construction was obligatory or permissive.

No liability, however, attaches for damages occasioned by the non-performance of powers which are merely permissive.

The W. Municipality possessed the power of lighting its streets and covering the furrows running along such streets, but no obligation was imposed upon it to exercise such power. A pedestrian on a dark night fell into a furrow which was neither covered nor lighted and sustained damage in consequence.

Held, on appeal from the Magistrate's Court, that the action brought for such damage had been properly dismissed.

Jordaan v. The Worcester Municipality 195

Death notice—Application for leave to file—Rule nisi. *Re Fernandez* ... 298

Deed—Registration—Practice.

A deed, although lodged in the Deeds Office, is not considered as

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passed until it has been signed by the Registrar of Deeds.		plus—Master of Supreme Court—Rule nisi— <i>Ex parte</i> Slater	... 338
Ruck v. Registrar of Deeds ...	206	Derelict lands—Act 28 of 1881—Attachment — Sale — Inquiry — Agent — Remuneration—Taxation.	
Defamation— <i>Animus injuriandi</i> —Privilege—Trap— <i>Nulla injuria est quae in volentem fit</i> .		<i>The Court refused to direct the Taxing Officer to tax a reasonable remuneration proposed to be paid out of the proceeds of the sale of derelict lands by a Municipality to an agent who had been employed by the Municipality for the special purpose of instituting an exhaustive inquiry as to the exact amount of rates payable in respect of each lot attached.</i>	
<i>The defendant a hotel proprietor, having found behind a shelf in the bar of his hotel a letter addressed to B., which contained defamatory matter regarding the plaintiff, and which had been left there by the plaintiff, a former proprietor, showed the letter and its contents to the barman on the impulse of the moment, without knowing whether it was genuine or not, and with the view of discovering how the letter came to be there.</i>		<i>Ex-parte</i> Pinn (in his capacity as Town Clerk of the Municipality of Port Elizabeth	... 187
<i>Held, that even if the occasion was not in strictness of law a privileged one, the circumstances under which the contents were made known to the barman justified the Court in holding that there was no animus injuriandi on the part of the defendant.</i>		Derelict Lands Act — Application under Transfer to executor <i>dative</i> — <i>Ex parte</i> Dettmar	... 271
<i>Subsequently the plaintiff informed one P., a servant in his employment and a customer of the defendant, of the contents of the letter, with a view to P.' making use of this information to obtain a communication of such contents from the defendant.</i>		2. — Attachment — Rates — Sale — Error.	
<i>Held, upon the principle that nulla injuria est quae in volentem fit, that the success of the stratagem cannot be relied upon by the plaintiff as a ground of action for an injury done to him.</i>		<i>Where land had in error been attached and sold under the Derelict Lands Act, 1881, to pay Municipal rates which were supposed to be due, but which as a fact were not due, the Court, all parties consenting, allowed the purchaser and the High Sheriff to consent to the cancellation of the sale.</i>	
Bennett v. Morris ...	317	<i>Ex parte</i> Pinn and Others	... 362
<i>De lunatico inquirendo</i> — Dangerous lunatic—Act 20 of 1879, section 2 —Detention — Discharge — Milne's Trustees v. Nicolson	137	3. — Application under—Rule nisi.	
DUPURY Sheriff—Attachment—Rights of pledgee — Interdict — Van den Heever v. The Deputy Sheriff for Albert and Beylerveld	116	<i>Ex parte</i> Strasheim	... 363
Derelict land—Municipal rates—Attachment—Sale—Owner of land sold —Application for payment of sur-		Discharge of debt— <i>Lex loci contractus</i> — Insolvency — Rehabilitation — Pledge — Security—Trustee—Execution.	
		<i>The debts of an insolvent, incurred prior to his insolvency, are not discharged until he has obtained his rehabilitation.</i>	
		<i>A debt discharged by the law of the country where it was made payable cannot be sued for in any other country provided that the discharge amounts to an extinguishment of the debt.</i>	

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M, being resident in the Transvaal, pledged certain shares to C. in security of a debt incurred there and afterwards his estate was sequestrated as insolvent by the High Court of the Transvaal.	
C. neither proved his debt nor realised his security.	
M. without first obtaining his rehabilitation came to reside in this colony.	
Held, in an action brought by C. against M. for the amount of the debt, that the Transvaal insolvency was not per se a bar to the action, but that, without the trustee's consent, no execution should issue against any effects in this colony which, by virtue of such insolvency, could be claimed by him.	
Held, further, that the retention of the shares by C. did not amount to a waiver of his right to sue for the amount of the debt, but that the shares should not be declared executable without giving the trustee an opportunity of claiming delivery of the shares for realisation.	
Cape of Good Hope Bank v. Melle	399
Discovery — Rule of Court 333 (b) — Party to an action — Practice.	
A person becomes a party to an action within the meaning of Rule of Court 333 (b) as soon as the summons has been issued.	
Wiese v. Mostert	133
DIVISIONAL COUNCIL — Election — Subsequent cancellation — Illegality — Civil Commissioner — Costs de bonis propriis — Divisional Council, Britstown v. Civil Commissioner, Britstown, and Roux	96
Divorce — Marriage without community — Claim in reconvention — Exception. In an action for divorce on the grounds of adultery the defendant (the wife) admitted the adultery, but claimed in reconvention the payment of certain money advanced by her to the plaintiff, and also certain	
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furniture her property in the plaintiff's possession.	
The Court overruled an exception to the claim in reconvention that it was not competent in an action for divorce to set up such a claim.	
Pressney v. Pressney	286
2. — Marriage in community — Forfeiture of benefits — Division of joint estate — Costs of action — Petition of Martha Hodgson	333
Donation — Transfer — Illicit intercourse — Immoral consideration — Par delictum.	
The defendant while cohabiting with the plaintiff as his mistress gave and transferred a certain house to her, and afterwards, under her power of attorney, sold the house and received the proceeds.	
Held, on appeal against a judgment ordering the defendant to account for such proceeds, that, inasmuch as the land had been transferred to the plaintiff, and the evidence failed to establish the defence that the transfer was not intended to operate as a gift, the defendant could not rely on the immorality of the cohabitation as a ground for treating the proceeds of the sale as his own.	
Aburrow v. Wallis	302
1. Dramatic Copyright — Operas — 3 & 4 Wm. IV., cap. 15, section 1—5 & 6 Vic., cap. 45, section 20 — Infringement.	
S. the assignee of the right of representing Gilbert and Sullivan's operas in the Colony, applied for an interdict restraining B. and P. from giving representations of the operas in a town in which they had advertised to appear.	
A rule nisi operating as an interim interdict was granted.	
On the return day the rule was discharged, but the respondents were ordered to pay 10 per cent. of the gross proceeds, which might be realised by representations of the	

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<i>operas in question, to the Deputy Sheriff of King William's Town to abide the result of any action which might be brought by the applicant for infringement of his rights.</i>		<i>cannot direct the taking of further proceedings which might lead to a different result.</i>	
<i>Searle and Gilbert and Sullivan v. Bonamici and Perkins "Proprietors of the Lyric Opera Company" ...</i>	171	<i>Until the election for any district has taken place the Civil Commissioner may correct any mistakes he may have made in the preliminary proceedings, provided that he does not contravene any provision of the Act.</i>	
2. — <i>Plays—Assignment—3 and 4 William IV., cap. 15, section 1—5 and 6 Vic., cap. 45, section 20—"Authenticated copy"—Interdict. S., the author of certain plays, authorised M. to be his representative in South Africa to use, sublet, or collect fees for all and every play or comedy of his of which he might supply M. with an authenticated copy. B. advertisea "Guiltless," one of S.'s plays, for a certain evening. M. obtained a rule nisi restraining B. from playing "Guiltless." On the return day M. was unable to prove to the satisfaction of the Court that "Guiltless" had been copy-righted in England, and failed to produce an authenticated copy of that play.</i>		<i>A nomination paper signed by four persons entitled to vote for a district and by a fifth person in the name of a deceased registered voter may be treated by the Civil Commissioner as null and void, and if, by mistake, he has published the nomination of the candidate, he may revoke such publication and declare the only other candidate who had been duly nominated to be duly elected for such district.</i>	
<i>The rule was discharged with costs.</i>		<i>The case of Osterloh v. Civil Commissioner of Caledon (2 Searle, 240) distinguished and followed.</i>	
<i>Marsh v. Bevan ...</i>	220	<i>Hitchcock v. Steytler—Roux v. Civil Commissioner of Britstown ...</i>	22
<i>Edict—Leave to sue by.</i>		<i>Encroachment—Public street—Trespass—Loxton v. the Mayor and Councillors of Queen's Town ...</i>	325
<i>The Court granted a petitioner leave to sue her husband by edictal citation in an action for restitution of conjugal rights where the husband had deserted his wife in 1871.</i>		<i>EVIDENCE—Law-agent—Misconduct—Removal from list of enrolled agents—Act 20 of 1856, section 37—Review.</i>	
<i>Personal service was ordered.</i>		<i>R., a law agent practising in the Resident Magistrate's Court for Caledon, was summoned on the 24th December, 1892, to show cause why his name should not be absolutely removed from the list of enrolled agents practising before that Court, on the grounds of his having in 1890 been convicted of fraud in the Transvaal, and sentenced to two years' imprisonment with hard labour.</i>	
<i>Ex parte Behrens ...</i>	355	<i>At the hearing of the case a letter, purporting to have been written by the Assistant Registrar of the High Court, Pretoria, and enclosing a copy of the indictment upon which R.</i>	
<i>EJECTMENT—Lease—Rent in arrear—Notice—Tender within a reasonable time—Turnbull v. Garlick ...</i>	140		
<i>ELECTION FOR DIVISIONAL COUNCIL—Civil Commissioner—Nomination—Rectification of mistake—Act 40 of 1889.</i>			
<i>When once a Civil Commissioner has officially declared the final result of any election for members of the Divisional Council in terms of Act 40 of 1889 he is functus officio and</i>			

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was convicted, and detailing the circumstances of his conviction and the subsequent quashing of the conviction, was read as evidence against R.

No certified copy of the record of the trial in the Transvaal was produced—the indictment was not certified, the Assistant Registrar's letter did not bear the seal of the High Court, nor was there any proof before the Court that the writer was the Assistant Registrar of the High Court.

R. recused the Magistrate on the grounds of animus, and objected to the proceedings as being inter alia informal, and refused to answer any questions.

R.'s name was ordered to be struck off the list.

Held, on review under Act 20 of 1856, section 37, that there was sufficient prima-facie evidence before the Resident Magistrate to justify him in calling upon R. to show cause, and that R.'s name had been properly struck off the list of enrolled agents.

Roos v. Resident Magistrate of Caledon 1

EXCEPTION—Pleading—Public interest—Specific performance—Damages—Breach of contract.

It is no valid defence to an action for specific performance of a lawful contract and, in the alternative, for damages, that it was cancelled in the public interest.

If, however, the plea does not rely upon the public interest as a legal justification for the breach of contract, but mentions it merely to show the motive which influenced the defendant, such plea is not on that account bad in law.

Exceptions to such a plea overruled, inasmuch as the Court does not encourage unnecessary exceptions.

Logan v. Colonial Government ... 108

EXECUTOR—Letters of administration—Domicile—Absence from Colony—Security—Removal of executor.

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Letters of administration should not be granted by the Master of the Supreme Court to any person who is absent from the Colony at the time of applying for the same.

An executor testamentary who is not only domiciled in the Colony but is actually here at the time of applying for letters of administration is entitled to obtain the same without any conditions.

If an executor testamentary is not domiciled here, but comes here for the purpose of applying for letters of administration, the Master should grant the same unconditionally if he is satisfied that such executor will reside within the jurisdiction until he has fully administered the testator's estate.

If, however, the Master is not so satisfied he ought to require security for the due administration of such estate.

When once letters of administration have been granted to any executor, whether testamentary, dative or assumed, he will not be removed from office owing to temporary absence from the Colony, if he is willing to remain in office, in the absence of proof that duties requiring performance have been left unperformed, or that some act of administration which cannot be done without his presence requires to be immediately done.

Upon a petition by persons appointed by will as executors together with a person resident in the Transvaal to restrain the Master from granting him letters of administration, the Court directed that, if such non-resident should apply in person, the Master should judge whether it is a case in which letters should be granted unconditionally or on condition of proper security being given, and that, if the applicant should not come into the Colony at all for the

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purpose of his application, the Master should refuse to grant him letters.	
<i>In re Schoeman</i>	3
2. — Trust—Release.	
Where the Court was satisfied that the interests of an executor were in conflict with the interests of the estate of which he was executor he was at his request released from his trust.	
<i>Ex parte Mcleod</i>	481
3. — Refusal to perform duties — Insolvency—Removal— <i>Re Albert's Estate</i>	264
1. EXECUTORS—Account — Extension of time within which to file—In the Estate of the late George Palmer... 143	
2. — Claim for services rendered to the deceased—Refusal to admit—Evidence—Interdict.	
The Court approved of the action of executors in refusing to admit a claim of £815 alleged to be due in respect of services rendered to the deceased in the absence of proof of the bona fides of the claim, and refused to grant an interdict restraining the executors from selling certain landed property in the estate claimed by the applicant, leaving him to his remedy in damages in the event of his establishing his claim.	
<i>Johnson v. Powell's Executors</i> ...	181
3. — Action for an account— <i>Clements v. Robertson's Executors</i> ...	457
Executor testamentary—Absence from the Colony — Transfer of land—Solemn declaration—Act 19 of 1891, section 5.	
The Court authorised two executors testamentary, without making the solemn declaration under Act 19 of 1891, section 5, to pass transfer of landed property sold in the estate without the assistance of the third executor, who had been absent from the Colony since 1868, and who was reported to be dead, but no proof of his death was before the Court.	

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<i>Ex-parte</i> The Board of Executors and Cartwright	123
2. — Application for removal—Rule nisi— <i>Ex parte Simes. Re Jones's Estate</i>	338
False imprisonment—Malicious arrest—Real injury — Reasonable cause — Constable—Credible information—Ordinance 40 of 1828, section 23.	
In an action against a constable for malicious arrest, it appeared that he arrested the plaintiff upon information supplied by the owner of a coat which had been stolen from along a roadside and which he had found in the possession of the plaintiff shortly afterwards.	
Held, that the defendant, having acted bona fide upon credible information supplied to him by others, which would justify the conviction of the plaintiff for theft, was protected from liability.	
<i>Jesson v. Jonas</i>	248
Farm—Joint purchase—Alleged fraud— <i>Geldenhuys v. Geldenhuys</i> ...	269
<i>Fidei-commisum</i> — Will — Executors—Bond.	
<i>Brink v. Loubser's Executor</i> ...	460
FIRE POLICY—Payment—Interdict.	
The Court granted an interdict restraining a Fire Insurance Company from paying the amount of a fire policy to the insured, against whom allegations of fraud and of intention to abscond were made on affidavit, pending the appointment of a trustee in the deponent's insolvent estate, and an action to be instituted by him against the insured.	
<i>Alberts v. Kaplan</i>	35
FRAUD—Illegality— <i>Ultra vires</i> —Colourable transaction—Directors of company—Reserved shares— <i>Culpa lata</i> — Winding-up Act, section 47—Damages—Misfeasance or breach of trust.	
A fraudulent or knowingly illegal contract entered into by directors of a company for the sale of certain reserved shares of the company cannot	

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<i>be relied upon by them as a justification for delivering such shares to the purchaser at a time when they had risen considerably in price above that at which they were sold.</i>	
<i>In estimating the damages sustained by the shareholders by reason of such delivery no presumption should be allowed in favour of the directors that but for their fraud or illegality the shares would not have risen.</i>	
<i>In an action brought by the trustees of a company on behalf of the shareholders against certain directors for their misfeasance in delivering shares then selling at 48s. 6d. each upon payment by the purchaser of only 20s. each, the defendants relied upon a prior contract of sale as a justification for such delivery.</i>	
<i>Held, that, inasmuch as the contract of sale as understood by the defendants was illegal, and, as found by the Court, was moreover fraudulent, it afforded no defence to the action, and that the measure of compensation was the difference between the market price of the shares when they were delivered and the price at which they were sold; but, the plaintiffs consenting, the damages were reduced to the amount of profits actually realised by the purchaser.</i>	
Trustees of Asbestos Company v. Hirsche and Others—Hirsche and Others v. Trustees of Asbestos Company	68
Goods sold and delivered — Action — Proof of agency—Glaeser's Executor v. Quin	272
Government — Jurisdiction — Magistrate's Court—Act 37 of 1888—Waiver—Exception.	
<i>In an action brought in a Resident Magistrate's Court against the Colonial Government for a sum under £20, the defendant's agent filed an exception to the jurisdiction which, while admitting that the defendant</i>	

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<i>had agreed to the jurisdiction, added that in so doing the defendant had acted contrary to law.</i>	
<i>Held, reversing the Magistrate's judgment, that the Government could lawfully renounce its right to insist upon actions against itself being instituted in the Supreme Court, that such renunciation must be clearly proved, but that the exception which admitted an agreement to submit to the Magistrate's jurisdiction ought to have been overruled.</i>	
Clifton v. Treasurer of the Colony	376
HIRE—Wagon—Loss—Act of God—Alleged negligence — Liability — Summons disclosing no cause of action — Exception sustained on appeal — Mbana and Others v. Zenzile	100
Holograph will — Attestation — Letters of administration—Master—Wills Ordinance, No. 15 of 1845, section 3. <i>B. executed a will written throughout in his own handwriting.</i>	
<i>The will covered three pages of foolscap paper, but was signed by the testator and witnessed on the third page only.</i>	
<i>The testator bequeathed his entire estate to his executors upon trust for the sole benefit of his children, to be equally divided amongst them share and share alike, such share to be paid to each of them upon his or her attaining the age of 21, and in the event of any of them dying before that age, then his or her share was to be equally divided amongst the survivors provided however that so long as his wife lived, to the approval of his executors, single and unmarried the executors were to pay the interest derived from the various investments to her for the support of herself and the children, . . . and in case all the children died before 21, then the executors were to pay the interest derived from the investments to his wife for her</i>	

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<i>sole use and benefit so long as she lived single and unmarried, and on her death or remarriage, the executors were to realise the estate and hand the proceeds as a bequest to the trustees of the Diocese of Cape Town to be invested by the Diocesan Finance Commission for the use of the Sick and Aged Clergy Fund of the English Church in South Africa, if such fund should be at the time still existing, but should that fund not be in existence, then the money was to be invested for the benefit of such Diocesan Fund or work as the Lord Bishop for the time being might determine.</i>	
<i>The Master, on application, being made for letters of administration, refused to grant them on the grounds that the provisions of the Wills Ordinance with regard to attestation had not been complied with.</i>	
<i>The Court following Steer's Executor v. The Master (5 Juta, 313) held the will valid, and directed letters of administration to be granted to the executors.</i>	
Robb v. The Master— <i>Re</i> Bromehead's Will	129
2. — Ordinance 15 of 1845 —Witnesses.	
<i>Witnesses to a holograph will can only be dispensed with where the testator has distributed his property amongst all his children.</i>	
<i>Ex parte Pillans</i>	278
IMPORTER—Licence—Malt—Act 38 of 1887, section 2—Contravention—Conviction—Appeal.	
<i>A person, who annually imports £1,200 of malt or other ingredients to be used in the manufacture of beer sold in this country, is liable to an importer's licence under Act 38 of 1887.</i>	
<i>The case of Regina v. Poppe (2 C.T.L.R., 393) commented upon and distinguished.</i>	
Regina v. Ohlsson	25

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Indictment — Defeating justice — Contempt of Court—Attempt to commit a crime—Inciting another to commit a crime—Conspiracy—Principals —Overt act.	
<i>It is an indictable offence to defeat the course of justice, or to attempt to commit that or any other crime.</i>	
<i>To solicit or incite another to commit a crime would amount to an attempt.</i>	
<i>Where a crime is attempted or committed by any person in pursuance of a conspiracy between two or more persons, they are all indictable as principals for the attempt to commit the crime or for committing the crime itself, as the case may be.</i>	
<i>But a bare conspiracy to commit a crime is not a substantive and indictable offence except where such conspiracy is declared by special law to be a crime, as for instance, a conspiracy against the safety of the State.</i>	
<i>At the trial of the prisoners for "conspiracy to defeat the course of justice" exception was taken that the "charge as laid is not an indictable offence."</i>	
<i>Held, upon a question reserved for the opinion of the Court, that the exception was a good one.</i>	
<i>Queen v. February and Mei (27th February, 1841) approved.</i>	
Regina v. Kaplan	364
INSOLVENCY—Trustee—Removal—Ordinance 6 of 1843, section 52— <i>In re</i> Estate of Redlinghuys— <i>Ex parte</i> Barry	35
2. — Ordinance 6 of 1843, section 127—Will—Bequest—Execution—Theron v. Collett	54
3. — Trustee appointed in Griqualand West—Application for confirmation—Act 39 of 1877, section 13— <i>Ex parte</i> Pooley— <i>In the Insolvent Estate of</i> Isabella S. O'Connell	64

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4. — Rehabilitation—Application refused. <i>Where an insolvent, who had surrendered his estate seven years before the date of the application for his discharge, had framed false schedules; and had refused to render his trustee any assistance in looking after the live-stock and other assets of the estate, the Court refused to order his discharge but granted leave to apply again in three years.</i> <i>Ex parte Van Zyl</i>	112
5. — Act 38 of 1884—Rehabilitation. <i>The Court granted the rehabilitation of an insolvent the account and plan of distribution in whose estate had not been confirmed owing to the negligence of the trustee, who at the date of the application was alleged to be dead but proof of his death was not before the Court.</i> <i>Ex parte Newlands</i>	297
6 — Marriage in community—Joint estate—Rehabilitation of surviving spouse— <i>Ex parte Glynn</i> ..	236
7. — Liquidation and Distribution account—Objection. <i>An insolvent lodged an objection to certain claims admitted and brought up in the liquidation account of his estate, but took no further steps in the matter.</i> <i>On motion made by the trustee the Court ordered the confirmation of the account by a given date, failing an application by the insolvent on or before that date.</i> <i>Robert's Trustee v. Roberts</i>	223
8. — Proof of debt—Application to expunge— <i>Steyn's Trustee v. Steyn, Aucamp v. Steyn's Trustee and Steyn</i>	209
9. — Property in possession of insolvent—Act 6 of 1843, section 76. <i>In the absence of satisfactory proof that property found in the possession of an insolvent belonged to his son the Court refused to grant an</i>	

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<i>order restraining the trustee from selling the same.</i> <i>Steyn v. Steyn's Trustee</i>	185
10. — Ordinance 6 of 1843, Section 84—Undue Preference—Trustee—Co-defendant—Action. <i>Zackon v. Arp's Trustee and others</i> ...	415
11. — Proof of debt—Fine—Alternative of imprisonment — Insolvent's locus standi—Diamond Trade Act, 1882—Execution of sentence for payment of fine—Judge's warrant—Ordinance No 6 of 1839. <i>In case of the insolvency of a person who has been convicted of an offence and sentenced to pay a fine without an immediate alternative of imprisonment, or a subsequent special commitment by virtue of Ordinance 6 of 1839, the person, in whose favour the penalty has been imposed, is entitled to prove the amount of the fine in competition with the other creditors of the insolvent.</i> <i>The insolvent has no locus standi for the purpose of expunging the proof, if the only question is whether the person who has obtained a judgment for the penalty is entitled to compete with the other creditors.</i> <i>The 56th and 57th sections of the Diamond Trade Act, 1882, were intended to provide speedy means for the execution of a sentence for the payment of fines inflicted under the Act and not to deprive the Government of its right by other means to recover the balance of the fine, if sufficient has not been levied under the Judge's warrant.</i> <i>Where the sentence imposing the fine gives an alternative of imprisonment on "non payment" of the fine the accused may, in the absence of express provision to the contrary, prevent the execution of the judgment for the amount of the fine, by electing to serve his full term of imprisonment.</i>	

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Contat v. Contat's Trustee and the Attorney-General ...	416
Interdict—Trespass—Municipal Regulations—Removal of stoeps—Notice—Waiver.	
<i>When an interdict is applied for the applicant should state not only the facts in his favour but also those which might induce the Court not to grant the interdict.</i>	
Fletcher v. Town Council of Cape Town	128
2. — Land appropriated for railway purposes—Attempted sale—Clayton N.O. v Metropolitan and Suburban Railway Co.	264
3. —	
<i>The Court granted an interdict restraining the respondent from cutting wood on a farm which he alleged he held for a term of three years under an agreement of lease, but no lease had been actually executed.</i>	
Smith v. Broad ...	346
4. — Fraud—Edict—Leave to sue by.	
<i>Where conduct amounting to fraud was alleged against a defendant the Court granted an interdict restraining him from parting with his property pending the decision of an action instituted against him.</i>	
Ex parte Nicolay ...	355
5. — Will—Executors testamentary—Undue influence.	
<i>The Court granted an interdict restraining executors testamentary from selling landed property, which the testator had directed should be sold six weeks after his funeral, it being alleged on affidavit that the executors testamentary had procured the execution of the will by fraud and undue influence at a time when the testator was non compos mentis.</i>	
Classen v. Lerm—ReGrundling's Will...	397
6. — Rectification of transfer—Fraud—Mistake—Duress—Railway—Expropriation—Transfer Deed—Recital in deed—Act 9 of 1858—Compensation—Registration—Servitude	

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<i>By Act 23 of 1889 the defendant company was empowered to expropriate certain land for railway purposes, with all the powers which are by Act 9 of 1858 bestowed upon the Commissioner of Roads in regard to taking and acquiring lands necessary for the making or repairing of main roads. A question having arisen between the company and the plaintiff as to the compensation to be paid for certain land belonging to the plaintiff which the company required for railway purposes, it was referred to arbitrators upon the basis of a purchase of the land by the company.</i>	
<i>Before transfer the company discovered that the land would not be required for railway purposes, but the plaintiff insisted upon payment of the compensation awarded by the arbitrators.</i>	
<i>The company having paid the compensation insisted upon having a clean transfer, whereupon the plaintiff passed a duly registered deed which, after reciting that the company was empowered by Act 23 of 1889 to expropriate land for railway purposes, ceded and transferred the land in question in the usual form without any servitude or restriction of any kind.</i>	
<i>Held (a) that, in the absence of fraud, the plaintiff was not entitled to an interdict restraining the company from transferring the land to the co-defendant Walker, or to claim a rectification of the transfer by inserting the terms of certain agreements alleged to have been made between the plaintiff and the company before reference to arbitration, inasmuch as the plaintiff knew before passing transfer that the company insisted upon a clean transfer, and would not have paid the price or accepted transfer on any other terms; (b) that the recital in the deed could not control the operative part which was unambiguous, and (c) that even</i>	

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<i>if the recital were allowed to control the operative part the reference in the recital to Act 23 of 1889 had not the effect of limiting the company's use of the land to railway purposes in case the land, after being expropriated, was found not to be required for such purposes.</i>	
Clayton, N.O., v. Metropolitan Railway Company and Walker ...	405
Interpleader—Summons — Exception — Execution creditor — Messenger — Damages.	
<i>A third party whose goods have been taken and sold in execution to satisfy a judgment of a Magistrate's Court does not, by reason of not having given notice of his claim to the messenger, forfeit his right to claim damages from the execution creditor if he can prove that such creditor, knowing to whom the goods belonged, had directed the messenger to sell the goods.</i>	
<i>A summons in a Magistrate's Court alleged that the defendant, knowing that certain furniture belonged to the plaintiff, and after receiving written notice to that effect, wrongfully caused such furniture to be sold under a writ of execution against one G., and the summons further claimed damages for such wrongful act.</i>	
<i>The defendant excepted to the summons on the grounds that he was not responsible for the execution of the Court and that the plaintiff, by not interpleading, had foregone his remedy.</i>	
<i>Held, on appeal, that the Magistrate ought to have overruled the exception.</i>	
Richold v. Gardner ...	378
Judgment—Rule 329 (d)—Application for leave to enter appearance—Defence — <i>Bona-fides</i> — Lewin v. Greef and the Registrar of the Supreme Court—Greef v. Lewin ...	123
1. JUDICIAL separation — Account — Action — Compromise — Louw v. Louw ...	177

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2. — Husband and wife—Ill-treatment — Habitual intemperance—Custody of child.	
<i>Ill-treatment which, by itself, is not sufficiently serious to entitle a wife or husband to a decree of judicial separation would, if accompanied by habitual intemperance, entitle her or him to such a decree.</i>	
<i>A wife who obtained a decree under such circumstances declared entitled to the custody of a child, a boy, of the marriage until he attained the age of at least seven years, with leave to the husband to apply for further directions at the end of that time and with liberty of access to the child, in the meantime, at all reasonable times and places.</i>	
Goldsworthy v. Goldsworthy...	134
3. — Action — Insufficient proof of cruelty—Jearey v. Jearey ...	278
Jurisdiction—Process in aid—Writ of execution — Writ of arrest — 8th Rule of Court—Judge of Supreme Court.	
<i>A judge of the High Court of Griqualand, sitting at Kimberley, has no jurisdiction to issue, or order the issue of, process of execution upon an unsatisfied judgment of that Court against property situated elsewhere in the Colony than in Griqualand West, even although he purports to act in his capacity as a judge of the Supreme Court.</i>	
<i>Orders of the Supreme Court must be made in open Court held in Cape Town.</i>	
<i>Writs of arrest under the 8th Rule of Court may be issued by the Registrar of the Supreme Court upon the proper affidavits being filed, but they must be confirmed in the Supreme Court unless the debt sued for has been paid.</i>	
<i>The case of Fisscher v. Nielsen (3 Juts, 370) commented upon and explained.</i>	
Hyman's Trustees v. Randiess ...	221

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Land—Sale—Transfer—Action—Wiese v. Mostert	230
Landed property Registered in name of person supposed to be dead—Transfer— <i>Ex-parte</i> Craig ...	218
Law-agent—Agreement—Alleged breach—Professional services—Application for an interdict refused—Sheard v. Cairncross	334
Lease — Occupation — Rent — Damages — Action — Hanau and Hoffa v. Spooner	179
Lessor and lessee — Diamond mine—Diamondiferous ground—Right of prospecting — Appointment of "viewer"—Surrender of land leased. <i>By articles of agreement between the plaintiffs, as owners of certain land, and the defendants as lessees of such land for the purpose of being used as depositing floors for their diamondiferous soil from an adjoining mine, it was provided that should at any time any portion of the ground leased be proved to be diamondiferous, the lessees shall surrender such ground to the lessors, who shall there-upon grant an equal extent of other land for depositing floors and pay compensation. Held (1) that, in the absence of any express reservation, the lessors had no right of prospecting for diamonds in the ground thus leased; (2) that upon production of prima-facie evidence that the ground leased is diamondiferous the Court may grant leave to make a full examination of the ground and appoint a "viewer" for the purpose; and (3) that if the ground is found to be diamondiferous and the lessees bona fide intend to work the ground as a diamond mine the lessees may be compelled to make the surrender even although upon the examination diamonds have not been found in such quantities as to make it certain that the mine would be payable.</i>	
London and South African Exploration Company v. De Beers Consolidated Mines, Limited	326

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Letters of administration—Mutual will—Error in testator's name—Master. <i>One Rhoda, who could neither read nor write, together with his wife executed a mutual will, which after execution was placed in a closed envelope, in which it remained until after Rhoda's death, when it was opened, and on the will being read it was discovered that the testators names appeared in the body of the will as Rorich, which name also appeared below Rhoda's mark at the foot of the will, although his wife had signed her name correctly. The Court, on being satisfied as to Rhoda's identity, directed the Master to issue letters of administration to the surviving spouse, who had been appointed executor under the will.</i>	
<i>Ex parte</i> Rhoda	479
2. —Executor testamentary—Proof of death—Rule nisi—In the Estate of Ismail Safodien	
<i>Ex parte</i> Abrahams	145
LICENCE TO QUARRY—Lease—Grantee with notice of incumbrance—Interdict—Costs. <i>The Government, having granted a quarry licence to C. to quarry granite upon certain Crown land, made a grant of the land to W., who thereupon ordered C. to remove from the land and threatened to arrest his workmen if he refused. It appeared that W. before receiving the grant was aware that C. had for several years been quarrying granite by permission of the Government and might have ascertained the exact nature of his rights by reference to him. Held, that, C. was entitled to an interdict restraining W. from carrying out his threat before the expiration of the year for which the licence had been granted.</i>	
<i>Cane v. The Wynberg Municipality</i> ...	106
Liquidation — Company — Shares of absent shareholders— <i>In re</i> Kaffra-	

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rian Steam Landing, Shipping, and Forwarding Company ...	172
Liquor Licence—Refusal of—Renewal of—Conditions.	
<i>It is competent for a Licensing Court, in renewing a liquor licence, which it would have been justified in refusing on the ground of certain abuses, to insert into such licence any conditions, for the removal of such abuses, which it might have inserted into the original licence, including a condition that the liquor sold shall only be consumed on the premises and that liquor shall only be sold to persons frequenting the hotel kept by the licensee.</i>	
Rooseboom and Others v. Piquetberg Licensing Court ...	338
2. —Sale—Delivery—Act 28 of 1883, section 73, sub-section 7—Contravention—Conviction—Appeal.	
<i>P., the holder of a retail licence to sell wine and spirits from 8 to 9 a.m., and from 6 to 8 p.m., on all days of the week except Saturday, and on that day from 8 to 9 a.m. and from 2 to 5 p.m., sold L. two bottles of wine on Saturday, the 4th of March, 1892, before 5 p.m.</i>	
<i>L. gave instructions that the wine was to be sent to the boarding-house at which he was staying.</i>	
<i>The wine was not delivered immediately after the sale, but as it was being sent on the same evening between 7 and 8 p.m. to the purchaser's boarding-house, it was seized by a constable and P. was tried and convicted for contravening Act 28 of 1883, section 73, sub-section 7.</i>	
<i>Held on appeal that as the sale had been completed before 5 p.m. there had been no contravention of the Act.</i>	
Regina v. Pilkington ...	126
3. —Act 25 of 1891, section 26—Bona-fide lunch or dinner—Sunday privileges.	
<i>The test to be applied whether food supplied with liquor on a Sunday constitutes a "bona-fide lunch or dinner,"</i>	

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<i>in terms of the 26th section of Act 25 of 1891, is whether the food was ordered and supplied merely as an excuse for the supply of the liquor, or with the bona-fide object of being taken as a fairly substantial meal, with the liquor as a mere accessory.</i>	
<i>The holder of a liquor licence supplied two customers with beer on a Sunday evening at half-past eight, after they had bought a bit of biscuit and cheese, and the customers were found by the police standing and drinking the beer with no bread or cheese before them.</i>	
<i>Held, on appeal, against a conviction of the licence holder, that the circumstances were such as to justify the Magistrate in deciding that the meal was neither a bona-fide lunch nor a bona-fide dinner.</i>	
Regina v. Sutton ...	390
Loan—Defence—Repayment out of profits—Logan v. Read and Ash ...	201
Lost Bond—Certified copy—Registrar of Deeds.	
<i>Where it is sought to release a portion only of property hypothecated under a lost bond, the remainder of the property still being mortgaged, the authority of the Court must be obtained before the Registrar of Deeds will issue a certified copy of the bond, no provision being made for such a case in the Regulations framed under the Deeds Registry Act, 1891.</i>	
Ex parte Arderne ...	383
2. —Cancellation—Deeds Office Regulations 35—42—Non-compliance with—Ex parte Trustees Diocese of Cape Town ...	190
Lunatic—Curator—Landed property—Sale—Confirmation.	
<i>Where it was clearly for the benefit of a lunatic the Court confirmed a sale by the curator of landed property registered in the lunatic's name.</i>	
Ex parte Calitz ...	229
2 —Discharge—Certificate of Surgeon in charge of asylum—Curator bonis	
—Discharge—Whitson v. Thompson	341

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Magistrate's jurisdiction—Undue preference—Insolvent Ordinance.	
<i>A Resident Magistrate's Court has jurisdiction in an action for undue preference under the 84th section of the Insolvent Ordinance if in other respects the case falls within his ordinary jurisdiction under the 8th section of the Magistrate's Court Act.</i>	
Gie v. Trustees of le Roux ...	379
Malicious desertion—Restitution of conjugal rights—Claim in reconvention—Judicial separation—Cruelty.	
<i>In an action for restitution of conjugal rights, failing which, for divorce on the grounds of malicious desertion, the defendant admitted the desertion, alleged cruelty (which was fully proved) on the part of the plaintiff, and claimed in reconvention a decree of judicial separation. The Court granted a decree of judicial separation.</i>	
Willoughby v. Willoughby ...	186
Malicious injury, to property—Right of road—Bona-fide assertion of right.	
<i>A person who destroys a fence across a road on the property of another in the bona-fide belief that he has a right to the use of such road and for the purpose of asserting such right, cannot be convicted of malicious injury to property.</i>	
<i>Where no such right exists and no reasonable ground for belief in its existence the mere fact that the injury to property was done upon legal advice is not sufficient to disprove malice.</i>	
Conradie v. Kloppers ...	215
Marriage—Natives—Dowry cattle—Tembuland—Proclamation No. 140 of 1885—Polygamy—Domicile—Conflict of laws.	
<i>(1) The Courts of Tembuland may, where all the parties to a suit are natives, recognise the validity of all marriages between natives celebrated according to native law before the promulgation of Proclamation No.</i>	

140 of 1885, whether they be polygamous or not, and such Courts must decide questions of divorce or separation arising between natives so married in conformity with native law and custom, but the Courts of the Colony proper cannot recognise as valid any marriage entered into by a man who had one or more wives living at the time.

(2) Neither the Courts of the Colony nor those of Tembuland can recognise as valid any marriage celebrated after the date of the Proclamation with a man who had one or more wives living at the time.

If a marriage between unmarried natives has been celebrated according to native law and duly registered, the effect upon the parties and their issue and property is the same as if the marriage had been contracted under the marriage laws of the Cape Colony. If such last-mentioned marriage has not been duly registered the marriage is valid, and any questions of divorce or separation arising in the Tembuland Courts between the parties themselves must be decided according to Colonial law, but the effect of the marriage in other respects upon the parties and their issue and property must be decided according to the native law.

(3) Neither the Courts of this colony nor those of Tembuland can recognise the right of the husband, whose wife has deserted him, to take by force or violence the so-called "dowry" cattle while in the peaceable possession of the wife's father.

(4) Such cattle or their value may be recovered by the husband by due process of law in the Courts of Tembuland if the wife has deserted her husband without just cause.

If the marriage took place before the Proclamation it would make no difference that such marriage was polygamous; but if the marriage took

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place after the Proclamation the right of the husband who, at the time of such marriage had a wife living, or who after such marriage took another wife, would not be recognised.

(5) The Courts of the Colony proper cannot recognise the validity of any marriage celebrated in the Colony proper according to native custom without the solemnities required by Statute, and therefore the husband so married cannot, on desertion by his wife, reclaim the cattle from her father.

(6) The Courts of this colony will, however, recognise the validity of a marriage celebrated in Tembuland according to native law and custom between two unmarried natives.

The cattle delivered to celebrate such a marriage may be reclaimed from the father of the wife if he is domiciled in the Colony and the wife deserts her husband without just cause.

Cruelty or a subsequent polygamous marriage would be considered to be just cause.

In an action brought before the Magistrate of Glen Grey, in this colony, by a husband married in Tembuland according to native custom before the date of the Proclamation to recover "dowry" cattle from the wife's father, then domiciled in the Colony, by reason of the wife's desertion, the Magistrate allowed an exception to the summons to the effect that marriage according to Tembu custom is immoral and therefore null and void.

Held, on appeal, that the exception ought not to have been allowed and that the Magistrate ought to have allowed evidence upon the questions whether the plaintiff at the time of his marriage had one or more wives living, and whether he had taken another wife after his marriage with the defendant's daughter.

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2. — Special licence — Father's and mother's consent — Minor—Fraud — False representation — Decree annulling marriage.

The defendant in collusion with the mother of a minor child fourteen years old obtained from a Resident Magistrate a special licence to marry her, without production of the father's consent, by means of a false representation that she was the child of a deceased man.

The father was not aware of the marriage until some weeks after it had been solemnised by a clergyman upon production of the licence, and as soon as he discovered it he applied for and obtained an interdict for restraining the husband from having access to the child pending an action to set aside the marriage.

Held, in an action brought for this purpose that as the marriage was by special licence no presumption of notice to the father existed, and that, by reason of the fraud perpetrated upon him, he was entitled to have the marriage set aside as null and void.

Johnson v. McIntyre ... 426

3. — Post-nuptial contract — Registration.

Where a husband domiciled in the Colony had married in Cassel, in Germany, with the intention of excluding community, but had neglected to execute an ante-nuptial contract before the marriage, being under the belief that after the marriage and on his return to the Colony he could enter into a contract making certain promised settlements on his wife, the Court on being satisfied that the case was bona fide allowed the registration of a post-nuptial contract containing the usual clauses of an ante-nuptial contract.

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4. — Breach of promise — Damages

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5. — Post-nuptial contract—Registration.	
<i>Where parties had married with the intention of excluding community, but had omitted to execute an ante-nuptial contract before the marriage, the Court authorised the registration of a post-nuptial contract.</i>	
<i>Ex parte Steele and Wife</i>	253
Marriage out of community—Adultery	
— Action for divorce—Funds to prosecute same.	
<i>The Court ordered a husband married out of community, who had been separated from his wife, and who was alleged to have committed adultery (which was not denied) subsequent to the separation, to pay £20 to his wife, who had barely sufficient means to support herself and her children, to enable her to institute an action for divorce.</i>	
<i>Tyfield v. Tyfield</i>	393
MASTER AND SERVANT—Act 18 of 1873, section 2, sub-section 2, and section 9—Conviction quashed on review—	
<i>Regina v. Cornelius Beukes</i> ...	97
2. — Act 18 of 1873, section 2, sub-section 2—Conviction quashed on review—	
<i>Regina v. Saronil and Dina Boomzailer</i>	97
3. — Act 18 of 1873, section 2, sub-section 4—Alleged contravention—Conviction quashed on review—	
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4. — Act 18 of 1873, section 2, sub-section 2—Conviction quashed on review—	
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5. — Act 18 of 1873, section 7, sub-section 4—Contravention—Special J.P.—Imprisonment without option of fine—Sentence quashed on review—	
<i>Regina v. Lyst Vortuin</i>	237
Medical and Pharmacy Act, 1891, section 35—Contravention—Resident Magistrate—Exceeding jurisdiction—Reduction of fine and alternative punishment—	
<i>Regina v. Adams</i>	234
Mines and minerals—Diamondiferous ground—Inspection— <i>Prima facie</i>	

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evidence of the existence of diamonds.	
<i>Where the applicants had leased certain ground to the respondents and under the lease they were entitled to a surrender on the discovery of diamonds in the ground leased the Court on being satisfied that there was prima facie evidence of the existence of diamonds in the land in question ordered an inspection of the ground for the purposes of a pending action.</i>	
<i>London and South African Exploration Company v. De Beers Mines</i>	300
Minor—Interest in landed property—Sale authorised.	
<i>Where it was clearly for the benefit of a minor the Court authorised the sale of his shares in certain farms; the Master having reported in favour of the sale.</i>	
<i>Ex parte Rautenbach</i>	243
2. — Landed property registered in name of—Improvements—Mortgage.	
<i>Under special circumstances the Court authorised a father, who had registered property in his minor daughter's name, to mortgage the property for the purpose of recouping him for expenditure incurred by him in improvements, he undertaking to be personally liable for the interest.</i>	
<i>Ex parte Von Post</i>	227
3. — Desertion by father—Appointment of tutor dative.	
<i>Where it appeared that a minor, who was entitled to certain property under the wills of his mother and his step-sister, had been deserted by his father, the Court authorised the Master to appoint a tutor dative to the minor.</i>	
<i>Ex parte Deneke—Re The Minor Clarke</i>	395
Minors—Landed property—Error in deed of transfer—Amendment.	
<i>Leave given a mother to act for her minor children in correcting an error in a deed of transfer.</i>	
<i>Ex parte Lubbe</i>	353

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Mortgage bond—Application for leave to pledge—Executors—No order— Re Bowker's Estate	229
Municipality — Regulations — Making Kafir beer — Native Location — Ultra vires. By Act 23 of 1880, section 38, the East London Municipal Council is empowered to frame such bye-laws, rules, and regulations "as may seem meet for the good rule and govern- ment of the Municipality." Municipal Regulation No. 205 framed under the above section reads as follows: "No shop or trading- station shall be allowed within the location except with the approval and during the pleasure of the Council, and no one shall bring into, make, or sell, or barter any Kafir beer or other intoxicating liquor whatsoever in the location." Held, on appeal from a conviction for "making Kafir beer" in a Native Location within the limits of the Municipality, that so much of the above regulation as prohibited the "making of Kafir beer" was ultra vires the Council.	
Lindani Mgoko v. The East London Town Council	147
Municipal Regulations — Ultra vires— Reasonableness—Dogs—Nuisance— Rabies. The Town Council of P.E. being authorised by Statute to prevent and abate nuisances and to frame all such regulations as may seem meet for the good rule and government of the Municipality, framed a regulation to the effect that, after due notice has been published in a local newspaper, all dogs allowed to be at large should be muzzled, and that any dog found unmuzzled in the public streets may be killed by order of the Council. Rabies having broken out in the town such a notice was duly given, and the plaintiff's dog having been found un-	

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muzzled in the public street was killed by the street-keeper. Held, in an action for damages for the loss of the dog, that inasmuch as the muzzling of dogs when at large is the only effectual means of preventing so serious a nuisance to life and health as the spread of rabies, the regulation was not ultra vires, and that, as car- ried out, it was not unreasonable, in- asmuch as when the notice was given there was rabies in the town.	
Chapman v. Town Council of Port Elizabeth	445
2. — Non-compliance with—Interdict —Town Council of Cape Town v. Metropolitan and Suburban Railway Company	386
MUTUAL WILL—Adiation—Survivor— Vesting—Legacy—Jus accrescendi —Testator—Intention. Husband and wife by a codicil to their mutual will bequeathed a farm, after the death of both of them, to their son "J." and made a further cumbrous provision, which the Court construed to mean, that in case another son should be born, he should take a half-share in the farm and "J." the other half. After the execution of the codicil and before the death of either testator another son "L." was born. The testator died first and the sur- viving widow adiated. Thereafter the son "J." died, leaving two children (the plaintiffs). The surviving testatrix and "L." then transferred the whole farm to "R." who was aware of the contents of the codicil. Held, that, whether or not the jus accrescendi applied to the legacy, "J." had, before his death, acquired a vested reversionary interest in one half of the farm and that the plain- tiffs, as his heirs, were entitled to have the transfer of their father's share to "R." set aside.	

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Held further, that, inasmuch as the codicil amounted in substance to a legacy of the farm, after the surviv- ing spouse's death, to both sons in equal shares, the presumption was that the testators did not intend the jus accrescendi to apply Steenkamp v. De Villiers and Others ... 58	3. — Adiation—Subsequent will with additional legacies—Notarial deed of release executed by heirs— Renunciation of rights—Family arrangement—Muller's Executors and Heirs v. Williams ... 119
2. — Massing of joint estate—Survivor —Usufruct—Renunciation—Pro- hibition against alienation. Husband and wife, married in com- munity of property, made a mutual will by which they appointed the survivor as their heir with their chil- ren of the first dying, directed a valuation of the joint property in order to ascertain the shares of the children, the immovable property being valued at ten shillings a morgen, and provided that the survivor should remain during his or her lifetime in possession of the joint estate, "but so that the said survivor shall have no right to sell. . . . that property, in such manner that such survivor shall not be bound to pay out during his or her natural life- time to the majors or married heirs their portions." Held, that upon the death of the husband the wife was entitled to her half-share and a child's portion and to a usufruct in respect of the rest of the joint estate, that the shares of the children were fixed by the valua- tion, that the prohibition against alien- ation applied only to the children's shares, and that the surviving wife was at liberty to renounce her life interest and pay out or secure the children's shares upon the basis of the valuation and for that purpose sell such portion of the immovable property as might be found necessary. The cases of Lucas vs. Hoole (Buch. 1879, p. 132) and Smith vs. Executors of Sayers (Foord, 66) distinguished. Naude v. Naude's Executors ... 152	4. — Landed property—Restraint upon alienation—Proposed sale to strangers—Interdict—Costs— Gouws v. Gouws and Robinson ... 242 Native marriage—"Dowry cattle"— Kafir custom—spoliation. The Courts of this Colony cannot recognise a Native Custom whereby the husband or heir of the husband, whose wife deserts him during his lifetime or his house after his death, may retake by force or stealth the dowry cattle, given upon her marriage to her father, while such cattle are in his peaceable possession. The plaintiff's daughter, who was accused by her husband's relatives of having caused her husband's death by witchcraft, deserted his late home and returned to her father, whereupon the husband's heir seized from the plaintiff's land the cattle which had been given to the plaintiff upon her marriage. Held, that, whether the heir had a right to claim the cattle back or not, he had no right to retake the cattle by force or stealth, and that, upon the principle, spoliatus ante omnia est restituendus the plaintiff was entitled to succeed in an action to recover the cattle so seized or their value from the heir. Ncotama v. Mncume... 261 NATIVE TERRITORIES PENAL CODE—Act 24 of 1886, section 198—Theft of goats—Evidence of concert—Con- viction sustained on appeal—Regina v. Jim and Others ... 16 2. — Act 24 of 1886, section 198— Contravention—Mare—Identifi- cation—Conviction sustained on appeal—Regina v. Mayukwana ... 54

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3. — Act 24 of 1886, section 198— Contravention — Identification of stolen property — Conviction sus- tained on appeal — Regina v. Nofame 127	
Negligence—Contributory negligence— Damages for injury.	
<i>In an action for damages for injuries sustained by the plaintiff by reason of the upsetting of a vehicle hired from the defendants, it appeared that the plaintiff had immediately before the accident given the driver some beer, notwithstanding the defendants' previ- ous warning that no liquor should be given to the driver, and that the drink- ing of the beer made him less careful than he would otherwise have been. Held, that the plaintiff having himself contributed to the accident was not entitled to recover.</i>	
Humbly v. Soeker Bros. 391	
NUISANCE—Offensive water—Interdict— Wynberg Municipality v. Clayton, N.O. 164	
Old scrip—Reconstructed company— Fraud—Action for refund of pur- chase price.	
Blackburn v. Stewart's Trustee ... 425	
ORAL PROMISE — Suretyship — Under- taking to repay advances made to another—Evidence.	
<i>There is no rule in the law of the Colony, as there is in the English law, that an action cannot be brought upon an oral promise to answer for the debt of another, but the evidence of such a promise must be clear and conclusive.</i>	
<i>Equally clear evidence is required of a direct promise to repay advances to be made to another as the promisor's agent, although such a promise is not required by English law to be in writing.</i>	
Korster v. Blake 27	
Par delictum—Fraud—False Represen- tation—Damages.	

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<i>A party to a contract, the object of which is to obtain money from the public by the exhibition of a diminutive child of ten as being a human phenomenon sixteen years of age, is not entitled to recover damages for its breach by the other party, even although it be proved that the defend- ant was fully aware at the date of the contract what the true age of the child was.</i>	
<i>A plaintiff in an action for damages for false representations is not en- titled to succeed if it be proved that he was not in fact deceived by such representations.</i>	
St. Marc v. Harvey 384	
PARTNERSHIP — Dormant partner — Anonymous partners — Insolvency —Proof.	
<i>Goods having been supplied by the plaintiffs to one M. upon his credit alone and in ignorance of the fact that the defendant was a dormant partner of his.</i>	
<i>Held, that the bare fact of such partnership having so existed did not entitle the plaintiffs to recover the price of the goods from the defen- dant.</i>	
Sellar Bros. v. Clark 197	
Pauper.	
<i>Where an application is about to be made to the Court for leave to sue in forma pauperis it is the duty of the attorney to satisfy himself that the petitioner is really a pauper before moving in the matter.</i>	
Chambers v. Chambers 277	
2. — Application for leave to sue — 125th Rule of Court—Rule nisi dis- charged— Watermeyer's Executrix v. Watermeyer 7	
3. — Leave given to sue as — Rule nisi made returnable twelve months after the date of the order.	
Horn v. Horn 356	
4. — Action for restitution of conjugal rights.	

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<i>In a pauper suit for restitution of conjugal rights, in which it appeared that the plaintiff's father was in a position to pay the costs of an action brought in the ordinary way; the Court granted a decree of restitution of conjugal rights, but ordered that the leave given to sue in forma pauperis should not apply to any subsequent proceedings.</i>		PLEA —Extension of time within which to file.	
Wolff v. Wolff	360	<i>Where a defendant in an action for slander had entered appearance, and six weeks afterwards had left the Colony for a few months for the benefit of his health, the declaration not having been filed until after his departure, and the defendant being under the impression that the plaintiff had abandoned the action, the Court, under the special circumstances of the case, granted an extension of time within which to file the plea.</i>	
PAUPER SUIT —Reference to counsel—		Bennett v. Morris	189
Appeal in forma pauperis—Defamation.		PLEADING — Amendment — Costs —	
<i>Where, upon the face of an application for leave to sue or defend in forma pauperis, it is clear to the Court that there is no cause of action or defence no reference will be made to counsel.</i>		Logan v. Colonial Government ...	152
<i>Appeals from Circuit Courts may be instituted in forma pauperis, but the fact that judgment has been given against the petitioner would justify the Supreme Court in looking more closely into the petitioner's case than in an original suit.</i>		2. — Amendment—Waiver.	
<i>Where, upon the face of a motion for leave to appeal in forma pauperis against a judgment for the defendant given by a Circuit Court in an action for defamation it appeared that the alleged defamation consisted in the statement that petitioner had bewitched the defendant's daughter,</i>		<i>Where, on the hearing of exceptions to a declaration, the plaintiff is allowed there and then to amend his declaration and no objection is taken to such amendment being made without previous delivery to the defendant of a copy of the amended declaration, such amended declaration will be treated as having been duly filed, and no objection can afterwards be taken in respect of the non-delivery thereof to the defendant.</i>	
<i>Held, that, as the statement was not defamatory, there should be no reference to counsel.</i>		Logan v. Read and Ash	52
Ex parte Du Plooy	11	PLEDGE —Sale—Delivery—Re-delivering—Execution creditor—Judicial attachment—Interpleader suit—Preference.	
Plaintiff — Non-resident — Insolvent —		<i>Where a transaction which in form is a sale is really intended to be a pledge the Court will, at the instance of the pledgor's creditors, treat it as a pledge with all its incidents.</i>	
Security for costs.		<i>An insolvent executed a so-called "deed of sale" whereby he purported to sell certain goods to his father, for the amount of a debt due to the father, and the latter agreed that the sale should be considered as cancelled upon payment of the debt.</i>	
<i>The mere fact that a plaintiff is an unrehabilitated insolvent does not entitle the defendant to demand security for costs.</i>		<i>Upon the execution of the deed of sale the goods were delivered to the</i>	
<i>The case of Van der Walt v. Hudson and Moore (4 Juta, 365) distinguished.</i>			
Lange v. Claase	371		

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<i>father, but were afterwards allowed to remain in possession of the son as his own property.</i>	
<i>Held, in an interpleader suit between the father and an execution creditor of the son, at whose suit the goods in the possession of the son had been attached, that the attachment gave the creditor priority over the father.</i>	
<i>The cases of Keyter v. Barry's Executor (Buch. 1879, p. 175) and Quirk's Trustees v. Assignees of Liddle (3 Juta, 322) commented upon.</i>	
Hofmeyr v. Gous	98
Police Offences Act—Police-constable—Arrest — Public-house — Right of entry.	
<i>Where a police-constable has the right of arresting a person for contravening any of the provisions of the Police Offences Act, 1882, he has the power, for that purpose, to enter a licensed public-house in which the offender has taken refuge, and the doors of which are open, even although he has not obtained the consent of the owner, and such owner who tries to prevent the arrest is liable for a contravention of section 8, sub-section 5, of the Act.</i>	
Regina v. Kleinschmidt	350
2. — 1882 — Trespass — Absence of mens rea—Rights under contract—Bona-fide dispute as to construction of contract—Ejectment.	
<i>The Court, on appeal, quashed the conviction of the appellant for an alleged contravention of the Police Offences Act of 1882, in trespassing on a farm, to the growing crops on which he had certain rights under a written contract with the owner, on the grounds that there was no evidence of mens rea and that if there was a bona fide dispute as to the construction of the contract the prosecutor should have proceeded by civil action for ejectment.</i>	
Regina v. Douw Willemse	419

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3. — 1882, section 10 — Abusive language—Public place—Conviction quashed on review — Regina v. Meitje Ras	155
Pounds Act, 1892—Sections 36 and 75 —Trespass—Damages—Redress at common law.	
<i>A person whose land has been trespassed upon by the cattle of another is entitled to redress at common law, where he has never impounded such cattle at all or where, having impounded such cattle, he has neither claimed damages under the 32nd or 33rd section of the Pounds Act, 1892, nor claimed assessment of damages under the 32nd section.</i>	
Thompson v. Schietekat	46
Possession — Detention of property — Action on contract—Suing wrong person.	
<i>A. and K. lived on a farm, which was leased by the former, and were partners in certain transactions in connection with the farm but not in all matters relating to it.</i>	
<i>W. instructed K. to buy some cows for her at a stock sale, and wrote to the auctioneer telling him to debit her with any cows which K. might buy on her behalf.</i>	
<i>K. bought a cow and its calf for £8, with which amount W. was debited by the auctioneer.</i>	
<i>K. delivered the cow to W., but took the calf to A's farm and kept it there "on the halves" with A.</i>	
<i>W. demanded the calf from A., and on the latter's refusal to give it up sued him in the Magistrate's Court for restoration of the calf or for its value £3.</i>	
<i>Held, on appeal from the Magistrate's judgment giving absolution from the instance, (1) that the Magistrate's judgment was correct, as it was not clear that the calf was in A.'s possession in the sense that he would have been justified in giving it up without K.'s consent, (2) that the action was</i>	

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on contract, and that there was no evidence of a contract between W and A, and (8) that K. and not A. was the proper person to have been sued.		2. — Process—Service—No proof of change of domicile.	
Wheeler v. Ashburner ...	423	<i>In the absence of evidence that a defendant had acquired a new domicile the Court directed service of process at his last known place of residence.</i>	
POUNDS—Act No. 15 of 1892—Care-taker—Trespass money—Tender of—Illegal impounding—Damages.		Wolff v. Wolff ...	277
<i>The plaintiff's cattle having been taken to the defendants' kraal for the purpose of being sent to the pound for trespass on the defendants' land, the plaintiff not finding the defendants at the kraal offered to the herd in charge the amount of trespass money lawfully payable, which the herd refused as insufficient.</i>		3. — 329th Rule of Court—Failure to enter appearance—London and S.A. Exploration Co. v. De Beers Consolidated Mines (Lim.) and the Registrar, Supreme Court ...	287
<i>On the defendants' return they were informed of the tender but impounded the cattle.</i>		4. — 335th Rule of Court—Affidavit—Evidence.	
<i>Held, that even if the herd was not a "caretaker" in terms of the 27th section of Act 15 of 1892, the defendants were not justified in impounding the cattle without first offering to the plaintiff to accept the tender and deliver back the cattle.</i>		The Secretary of State for War v. Metropolitan and Suburban Railway Company and Walker ...	381
<i>On an appeal against a judgment for damages for a deliberate delict or tort the Court does not scrutinize the evidence in support of damages so closely as in actions for breach of contract involving no turpitude on the defendants' part.</i>		PREFERENCE — Judicial attachment — <i>Pignus judiciale</i> —Pledge—Delivery—Re-delivering—Notarial bond—Judgment creditor and debtor.	
Stuurman and Twaisha v. Van Rooyen	32	<i>Judicial attachment of a judgment debtor's goods confers a preference thereon over a creditor, to whom the goods had been pledged by such debtor, but who, before such attachment, had re-delivered the goods to the debtor, and the fact that the pledge had been effected by means of a duly-registered notarial bond does not strengthen the claim of the bondholder as against the judgment creditor's judicial lien.</i>	
POUND ORDINANCE—Trespass—Rams—Penalty.		Kearns, Assignee of Bydell and Uys v. Cole ...	82
<i>The owner of more than one ram found trespassing on the property of any other person is liable to the penalty provided by the 52nd section of Ordinance 16 of 1847, in respect of each such ram.</i>		PRINCIPAL AND AGENT—Account—Summons in Magistrate's Court—Exception — Obligation to explain deficiency.	
Regina v. Broedryk...	15	<i>A summons in a Magistrate's Court alleged in substance, although in inartistic language, that the defendant, as manager of the plaintiff's business at L., had accepted as correct certain stock-lists of goods supplied by the plaintiff to and found by him in the place of business, and that a comparison of these lists with the defend-</i>	
Practice — Discovery — Inspection of documents—Rule of Court 333 (b) —Shaw v. Batchelor ...	113		

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<i>and's accounts of goods sold showed a certain deficiency unaccounted for.</i>	
<i>Held, that, in an action brought for the amount of the deficiency, an exception to the summons, that it disclosed no ground of action inasmuch as it did not allege that the loss was due to fraud or carelessness, had been properly overruled by the Magistrate.</i>	
<i>Assuming the statements in the summons to be correct, the obligation to explain how the deficiency occurred lay upon the defendant as the person entrusted with the custody of the goods and the management of the business.</i>	
<i>Failing such explanation the defendant held liable to account for and pay the deficiency.</i>	
Biddulph v. Yates	29
Privileged Will—Executrix—Letters of Administration—Master.	
<i>B. wrote his will with a lead pencil in his pocket book. The will bore his signature but was not witnessed.</i>	
<i>Besides appointing his wife executrix B. gave her a life interest in all his property with remainder to his children.</i>	
<i>The Court, following Steer's Executors v. The Master (5 Juta, 313), directed the Master to issue letters of administration to the wife.</i>	
Ex parte Browne	418
PRIVY COUNCIL—Appeal—Costs—Security—Trustees, Orange River Asbestos Company v. Hirsche and Others	102
Promissory note—Non-presentation—Exception—Magistrate's decision reversed on appeal—Carr v. La Grange	320
2.—Signature—Denial—Agent—Action—Blake Executors v. Louw	304
PROVISIONAL SENTENCE—Mortgage bond—Documentary evidence.	
<i>To a claim for provisional sentence on the balance of a mortgage bond the defendant objected that the plain-</i>	

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<i>tiff was not entitled to recover such balance until the defendant had received transfer of a piece of land alleged to have been purchased by him in addition to the land transferred and mortgaged.</i>	
<i>The declarations of purchaser and seller, and the deed of transfer, stated that £200 was the price of the land actually transferred and did not mention the additional piece of land.</i>	
<i>Held, that the defendant's unsupported allegation that such additional land had been purchased should not outweigh the documentary evidence, and that provisional sentence should be granted.</i>	
Haupt v. Korsten	22
2. — Acknowledgment of debt—Plaintiff ordered to go into the principal case—Rules of Court 25 and 330.	
<i>S. sued B. provisionally on an acknowledgment of debt.</i>	
<i>Provisional sentence was refused and the plaintiff ordered to go into the principal case.</i>	
<i>No further steps were taken by S</i>	
<i>Thereafter B. applied for leave to sign final judgment against S. by reason of his failure to proceed with his action.</i>	
<i>The Court refused the application with costs.</i>	
BASSON v. Schickerling	118
3. — Promissory note—Liquidity—Booyesen v. Van Zyl	114
4. — Promissory note—Liquidity—Bank of Africa v. Borlin	207
5. — Promissory note—Defence—Non-completion of contract in respect of which the note was given—Conditional life insurance policies—Blake v. Van den Heever	238
6. — Promissory note—Stale demand—Defence—Administration of estate—Executors—Fourie v. Fourie's Executors	332

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7.—Promissory note—Alleged condition—Breitmeyer v. Kilgour ...	332
8. — Promissory note—Van der Veen v. Le Roux and Another... ..	50
9. — Promissory notes — Defence—Payment — Evidence — Fagan v. Gous	62
10. — Interest — Mortgage bond — Rawstorne v. Van der Merwe ...	112
11. — Bills of exchange—Counter-claim for damages. <i>The Court granted provisional sentence on three bills of exchange where the defence set up was a counter-claim for damages against the plaintiffs for alleged breach of contract and for libel.</i>	
Share & Co. v. Harbottle, O'Brien & Co.	422
Purchase and sale—Warranty— <i>Actio redhibitoria</i> —Return of part of a flock. <i>To an action for the price of things sold and delivered, facts, which would have been sufficient to found the redhibitory action, afford a valid defence. A purchaser, who succeeds in the redhibitory action, is entitled to recover also the expenses incurred by him for the due preservation of the things sold and delivered to him.</i> <i>Where the purchaser of a flock of ewes, under a warranty that they had not been put to the ram within twelve months previously has killed some of them and by that means only could discover, and did actually discover, that a considerable proportion of the flock are in lamb, he can only be compelled to pay the price of those which he has killed, and he may in reconvention claim the amount of expenses incurred in respect of the remainder, he tendering to return such remainder of the flock.</i>	
Theron v. Africa	373
RAILWAY—Expropriation— <i>Malá fides</i> —Interdict — Alienation of expropriated land—Transfer,	

By agreement between a railway company and a contractor it was stipulated that the company should secure as much land as could be acquired under its Act and transfer to the contractor or his order, upon the completion of the contract, all land not actually to be used by the company.

In pursuance of this stipulation the contractor, as the company's agent, acquired more land from the War Department than was actually required for railway purposes and, according to the evidence given for the War Department, undertook with the department that if the Act should be passed only buildings which are easily removable would be erected on the land.

The deed of transfer of the land to the company recited that the land had been expropriated for railway purposes but contained no condition that the land was not to be alienated.

Upon the completion of the railway, the company proposed to transfer portion of the land to the contractor. Held, that as there was prima-facie evidence that the expropriation of such portion had been made for sinister and ulterior purposes the War Department was entitled to an interdict restraining the transfer with leave to the contractor to apply to set it aside.

The Company also proposed to transfer another portion of the land to a purchaser, alleging that it had been sold in order to enable the payment of a loan which had previously been raised on mortgage of the land for the purpose of paying the compensation awarded by arbitrators to the department in respect of the expropriation of the land.

Held, that the question whether the transfer should be interdicted must be tried by action to which the purchaser and the mortgages should be

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<i>parties, but pending such an action and in the absence of proof that the purchaser would be prejudiced by the delay, the Court granted a temporary interdict restraining the transfer.</i>	
Clayton, N.O. v. Metropolitan and Suburban Railway Company ...	8
Railway company—Negligence—Act 19 of 1887, Section 30.	
<i>The plaintiff's cow, which was lawfully grazing on a commonage (in the suburbs of Cape Town), which was separated from the defendant company's railway line by a fence, escaped on to the line through a gate, which it was the company's duty, under the 30th section of Act 19 of 1861, to keep closed.</i>	
<i>The cow was killed in the day-time by a passing train.</i>	
<i>Held, in the absence of any proof that precautions were taken by those in charge of the train to prevent the accident, that there was evidence of negligence to justify a verdict in the Magistrate's Court for the plaintiff.</i>	
<i>Held, further, that as the plaintiff might reasonably have believed that the gate would have been kept closed by the company, there was no proof of contributory negligence in allowing the cow to graze unattended on the commonage.</i>	
Metropolitan and Suburban Railway Co. v. De Villiers ...	279
Railway regulations—Machinery—Undamageable iron—Restitutio—Protest.	
<i>By the Railway Regulations of the Colonial Government the freight for "machinery" is charged at second-class rates, and for "undamageable iron" at ten per cent. less.</i>	
<i>The plaintiffs having imported certain iron machinery in separate pieces, and entered it in the Customs as "machinery" so as to save the import duty, sent it by railway to Du Toit's Pan.</i>	

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<i>In the consignment notes they described the articles as "undamageable iron," but the Railway Department charged them as for machinery.</i>	
<i>The amount having been paid under protest, the plaintiffs now sought to recover the difference.</i>	
<i>Held that, although some portions of the machinery might, if imported and consigned separately, have been fitly described as "undamageable iron," the consignment as a whole was properly charged for as "machinery," and that the plaintiffs were not entitled to recover the difference between the two rates.</i>	
Wesseltou Syndicate v. the Colonial Government ...	309
REGISTERED CONDITION—Interpretation of.—Sale of meal—Restraint on.	
<i>A mill property having been sold and transferred on condition that the purchaser shall not, either directly or indirectly, sell meal to anyone resident in the P. Municipality,</i>	
<i>Held, that a lessee from the purchaser was not prohibited by the condition from selling wheat to his customers within the P. Municipality, they being at liberty to have it ground elsewhere, and the price of the wheat being the same whether it be ground at such mill or taken away without being ground there.</i>	
Van Niekerk v. Blake and Schwartz ...	37
<i>Registration of title should not be ordered under Act 28 of 1881 unless the petition discloses prima-facie proof that the petitioner had by prescription, contract or otherwise acquired the just and lawful right to the ownership of the land sought to be registered.</i>	
<i>On a petition stating that the petitioner's predecessors in title had purchased from W. certain plots of ground bounded on one side by a passage to the use of which the purchasers were to be entitled, that the plots had been duly transferred to</i>	

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such purchasers, and that the petitioner was now the sole owner of these lots and no longer required the passage as such.	
Held, that, the presumption was that W. intended to reserve the ownership in the land beneath the passage to himself and that, in the absence of any proof to rebut that presumption, there was no prima-facie case to entitle the petitioner to registration of such land in his own name.	
Bank of Africa v. Daniel ...	103

Res judicata — Magistrate's jurisdiction — Future rights.

The requisites of a valid defence of res judicata are that the new demand must be of the same thing that has already been finally adjudicated upon, that it must be for the same cause and between the same parties.

Where, in an action for interest on a bond or rent under a lease, a defence has been raised virtually claiming a declaration that the bond or lease is invalid, a decision upon such claim would be res judicata between the same parties in an action for subsequent interest or rent when the same defence is raised on the same grounds.

In an action for rent in a Magistrate's Court it is not competent for the defendant to claim such a declaration which would be binding on the plaintiff in future.

It is, however, a general principle that a Magistrate has no jurisdiction to try a claim to which a bona-fide defence is taken having the effect, if valid, of extinguishing the plaintiff's claim and involving the decision of questions beyond his jurisdiction.

Held, therefore, that a Magistrate's Court has no jurisdiction to try a claim for rent on an agreement of lease without actual occupation, when a bona-fide defence is taken denying

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the validity or existence of such agreement.	
Bertram v. Wood ...	167
Resident Magistrate — Jurisdiction — Counter-claim—Compensation.	
A Resident Magistrate has no jurisdiction to adjudicate upon a counter-claim for unliquidated damages over £20 in an action in which the plaintiff claims less than £20.	
Colonial Government v. Stevens and Hollingsworth ...	141
Review- -Proceedings in Chief Magistrate's Court—Irregularity.	
On appeal to a hief Magistrate's Court from the judgment of a Resident Magistrate the Chief Magistrate heard and allowed the appeal in the absence of both parties to the suit. Held on review, that the proceedings had been grossly irregular and must be set aside.	
Pepa v. The Chief Magistrate of Tembuland and Kwayi ...	146
Rule nisi — Return day—Fresh service —Practice.	
Where on the return day of a rule nisi in an action for divorce on the grounds of malicious desertion, the case was not put on the list in consequence of the affidavit of non-compliance with the order of Court not having been filed by the plaintiff, the Court, on a subsequent application, supported by the necessary affidavit, for dissolution of the marriage, ordered the return day to be extended and fresh service to be effected on the defendant.	
Keenan v. Keenan ...	132
SALE — Pact — Servitude — Registration —Notice—Prohibition against selling liquor on land sold—Interdict.	
An agreement superadded to a contract of sale of land that the purchaser shall not allow the sale of intoxicating liquors on the land without the permission of the vendor is binding upon the executor of the purchaser.	

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<i>Where such an agreement has been introduced as a mere pact in favour of the vendor personally it would not be binding upon subsequent bona-fide purchasers without notice even although duly registered; but secus where the agreement constituted a servitude in favour of the vendor as the owner of another tenement, in which case registration would be sufficient notice.</i>	
<i>Interdict granted restraining the executrix of the purchaser from selling intoxicating liquors on the land sold without proof of pecuniary damage to the vendor.</i>	
Consistory Dutch Reformed Church, Steytlerville v. Bowman ...	85
2. — Written contract—Construction—Declaration of rights — Action — Lewin v. Greef ...	288
Sale of horses—Latent defect—Laminitis —Action for refund of price.	
<i>Absolution from the instance granted in an action for refund of purchase price of two horses warranted sound, but which were found to be suffering from Laminitis three days after they had been delivered, the evidence not being sufficient to prove that the horses were affected with the disease either at the time of sale or at the time of delivery.</i>	
Dunning v. Mellish ...	449
Seab Act of 1886—Inspector—Licence—Waiver.	
<i>Where a licence, whether original or a renewal, has been granted under Act 28 of 1886, section 5, there can be no prosecution under section 6 during the period of such licence.</i>	
Regina v. Theron ...	166
Schoolmaster — Pupil — Correction — Assault—Injury.	
<i>A schoolmaster's discretion in the punishment of his pupils should not be lightly interfered with, but chastisement which is obviously unreasonable or immoderate constitutes an actionable injury.</i>	

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<i>The nature of the offence for which the pupil has been punished is an important ingredient in deciding whether or not the punishment was unreasonable.</i>	
Regina v. Soga Mgikela ...	351
School regulations—Guarantee.	
<i>It is no defence to an action upon a sub-guarantee signed by householders to supplement the ordinary income of a public school that the deficiency sued for was caused by a debt incurred before the giving of the sub-guarantee, if such debt was properly incurred by the managers.</i>	
<i>Where a loan has been raised for the purpose of purchasing land and building school buildings, the interest upon such loan forms a charge upon the current income of the school.</i>	
Managers Oudtshoorn Public School v. White ..	250
Sentence and conviction — Appeal — Magistrate's Court Act—Pound Act —Attorney-General—Notice of appeal—Public prosecution—Private prosecution—Costs.	
<i>In every case of appeal against a conviction and sentence of a Magistrate's Court the provisions of the 4th section of Act No. 21 of 1876 must be complied with, and if the appeal is not prosecuted within forty-one days after the giving of notice the right of appeal ceases.</i>	
<i>An appeal against a conviction and sentence for a contravention of the 30th section of the Pounds Act (No. 15 of 1892) falls within the provisions of Act No. 21 of 1876, section 4.</i>	
<i>Notwithstanding the provisions of Act 21 of 1876 the practice of giving notice of appeal and of the grounds of such appeal, to the Attorney-General, as Public Prosecutor, should be continued in cases where the prosecution has been at the suit of the Crown.</i>	
<i>In cases of public prosecution a Magistrate's Court cannot award costs</i>	

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<i>either to or against the accused, and on appeal in such cases it is not the practice of the Supreme Court to award costs.</i>		<i>In an action for damages for breach of contract evidence is not admissible of any damages, which the law would not imply from such breach, unless the declaration contains an averment of the special damages sustained, or of such facts as would amount to a notification to the defendant that the evidence would be tendered.</i>	
<i>In cases of private prosecution a Magistrate's Court cannot award costs except where specially authorised thereto, (as for instance under the 74th Rule of the Magistrate's Court Act, 1856), but on appeal in all such cases the Supreme Court may award costs to the successful party.</i>		<i>Evidence of loss to the plaintiff of the use of the purchase price paid by him in advance held to be inadmissible in the absence of any averment of such loss, but it appearing that the defendant would not be prejudiced by the insertion of such an averment, the Court authorised an amendment of the declaration so as to enable the plaintiff to claim interest on the money so paid in advance.</i>	
Synders v. Theron	420	Philip v. The Metropolitan and Suburban Railway Company (Limited) ...	55
Shares — Attachment <i>ad fundandum jurisdictionem.</i>		Stolen money—Judgment under Rule 329—Celliers v. Sas	358
<i>The Court ordered the attachment of shares to found jurisdiction in an action against a defendant who, although domiciled in the South African Republic, was at the date of the order residing within the jurisdiction.</i>		Summons—Allegation of lawful occupation—Forcible ejectment from land—Action for damages—Resident Magistrate—Refusal to take evidence as to actual occupation.	
Ellerton Syndicate v. Hutchings ...	124	<i>In an action in a Magistrate's Court for damages for forcible ejectment from land alleged to have been in the lawful occupation of the plaintiff, the Magistrate allowed an objection to a question put to the plaintiff by his agent, as to who was at present in possession of the land, on the grounds that the right of occupation was not alleged in the summons.</i>	
2 . — Brokerage — Alleged partnership—Action for sums paid in error—Twycross & Co. v. Evans ...	80	<i>Held, on appeal, overruling the Magistrate's decision, and remitting the case to him to be tried on its merits, that it was not necessary to allege the right of occupation in the summons, that the allegation of lawful occupation was sufficient, and that the</i>	
Ship — Master — Intemperance — Removal—17 and 18 Vic., Cap 104, section 240—Rule nisi— <i>Ex parte Fuller In re "The Chiltonford"</i> ...	150		
SLANDER — Action — Damages — Murphy v. Creagh	42		
SPECIAL DAMAGES—Specific performance — Declaration — Amendment — Pleading—Evidence—Sale of land — Breach of contract — Loss of profits—Interest—Wilful or fraudulent refusal to perform contract.			
<i>As a general rule, subject to certain specific exceptions, a plaintiff suing for specific performance of a contract of sale is not entitled, in addition thereto, to claim damages in respect of the profit which he would have made if the thing or land sold had been delivered or transferred in due time.</i>			

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<i>Magistrate should have allowed evidence of actual occupation.</i>	
Madlonga v. Gova and Others ...	424
2. — Mistake in name of defendant—Amendment allowed—No order as to costs—Swanepoel v. Birk ...	122
Sunday Observance—Ordinance 1 of 1838, section 2—Contravention—Sale of gingerbeer and fruit—Conviction sustained on appeal—Regina v. Grenelli ...	199
SUPERANNUATED JUDGMENT—Revivor—Practice—Summons—Notice of motion—Magistrate's Court.	
<i>It is no valid objection to a motion in a Magistrate's Court for the revivor of a superannuated judgment of such Court that the defendant has been brought into court by means of a notice of motion, duly served, instead of a formal summons.</i>	
De Beer v. Rose ...	45
Tender—Condition.	
<i>In an action by Managers of a Public School against a sub-guarantor for one-third of the amount guaranteed by him the defendant tendered the amount claimed subject to its being refunded if judgment should be given on appeal to the Supreme Court in favour of another sub-guarantor who had likewise been sued for a similar amount on his guarantee.</i>	
<i>Held, reversing the Magistrate's decision that this was not such an unconditional tender as the plaintiffs were bound to accept.</i>	
Managers Oudtshoorn Public Schools v. Keating ...	251
Theft—Evidence of accomplices—Admissions—Conviction sustained on appeal—Regina v. Meza ...	320
2. — Cruelty—Act 18 of 1888, section 2—Conviction for theft sustained on appeal—Regina v. Peter Kiviet ...	150
3. — Conviction quashed on review.	
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Theft of horses—Possession—Conviction sustained on appeal.	
Regina v. Williem Jose ...	477
Trespass—Fence—Dividing line between farms—Removal—Action for damages— <i>Volenti non fit injuria.</i> Per De Villiers, C. J.:— <i>If two landowners make an arrangement to have a fence between them, and one goes a little beyond the line by mistake, that does not give ground for damages for trespass.</i>	
Lotter v. Brunson ...	259
2 — Damages—Interdict—Swanepoel v. Birk ...	299
3. — Damages—Exception—Act 20 of 1856, section 8, sub-section 3—Future rights—Jurisdiction—Exception upheld on appeal—Havenga and Herbst v. Steyn ...	26
Unsatisfied judgment—Writ of civil imprisonment—Magistrate's Court costs—Act 20 of 1856, Section 20.	
<i>B. was unsuccessful in an appeal from a judgment of the Resident Magistrate of Cape Town.</i>	
<i>The costs of the appeal amounted to £10 6s. 11d.</i>	
<i>Execution issued and a return of nulla bona was made by the Sheriff.</i>	
<i>Held, in an application for a writ of civil imprisonment against B. upon the unsatisfied judgment, (1) that the Magistrate's Court would have had jurisdiction to issue a decree of civil imprisonment upon an unsatisfied judgment of the Supreme Court on appeal; (2) that the Supreme Court had concurrent jurisdiction in respect of its own order.</i>	
<i>The Court granted a decree of civil imprisonment but with Magistrate's Court costs only.</i>	
Soeker Bros. v. Humbly ...	357

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Usufructuary— Authority to raise mortgage to repair property—Consent of heir— <i>Ex parte</i> Nagila. <i>Re</i> Ariefdien's Estate	337	The plaintiffs ordered from the defendant, who was not a manufacturer, a "One-horse Purnell Gas-engine" which was required to supply the motive power for grinding coffee.	
Vindictio—Property sold in an insolvent estate - Evidence—Questions of fact—Appeal.		The defendant supplied such an engine, which answered in every respect to the description of the one ordered, and the plaintiffs paid for it. After being used for a short time it was found that, owing to the insufficiency of the gas pressure in Cape Town, it did not work satisfactorily, but there was no evidence that any other engine of that description would have worked better with that pressure.	
Held, on appeal from a Magistrate's Court that there is no rule of law which binds the Supreme Court to accept a Magistrate's decision upon a question of fact.		Held, that any presumption of warranty that the engine would be fit for the plaintiffs' purposes was rebutted by the circumstance that the defendant only undertook to supply, as in fact he did supply, a particular article of a particular manufacture.	
Where therefore a defendant had bought a horse in the insolvent estate of the plaintiff's father, and the plaintiff subsequently claimed the horse as being his property, and sued the defendant for its delivery or for its value £20, and judgment was given in his favour, and the defendant appealed, the Court reversed the decision of the Court below on the grounds that there was not sufficient evidence before the Magistrate to justify him in finding that the horse was the property of the plaintiff.		Hall & Co. v. Kearns	156
Shaw v. Steyn	403	Water—Declaration of rights—Action.	
Warranty—Manufacturer—Sale—Presumption.		Louw v. De Villiers...	433
If goods are ordered of a manufacturer for a particular purpose known to the vendor there is an implied warranty that they shall be fit for such a purpose, but if an article of a definite nature is ordered the manufacturer warrants no more than that the article supplied is as fit as any answering the description in the order.		Waterworks Company — Supply — "Dribble System"—Meter—Interdict.	
If the vendor is not the manufacturer and the goods are not sold with all faults the legal presumption is that the vendor warranted them against such latent defects as would render them unfit for their ordinary use, but this presumption may be rebutted by the special terms of the sale or by other circumstances showing that a warranty was not given or understood to be given.		The Court refused to grant an interdict restraining a Waterworks Company from cutting off the water supply of an applicant who had refused to comply with the company's regulations regarding the method of supplying the water.	
		Lindley (The Claremont Municipality intervening) v. The Cape Town Districts Waterworks Company ...	143
		1. Will—Construction—Heirs—"Children and grandchildren"—Succession <i>per stirpes</i> —Legitimate portion.	
		A testator by his will appointed his children and grandchildren as his heirs.	
		Held that, in the absence of any other indication to the contrary in the	

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<i>will, the children of those of the testator's children only who pre-deceased him must be deemed to have been included in the term "grandchildren."</i>		5. — Landed property — Entail — Mortgage authorised to discharge debts owing by the estate— <i>Ex parte</i> Prins	214
<i>By a codicil the testator instituted the children of his son J. as heirs in his stead, and directed that J. should draw only the interest on the amount which would have devolved on him as heir.</i>		6. — Landed property—Restraint upon alienation—Mortgages—Sale—Executors— <i>Re Johnson's Estate</i> ...	238
<i>After the testator's death in 1872 J. claimed his legitimate portion, which was paid to him by the executors.</i>		7. — Attestation — Executors — Act 22 of 1876.	
<i>Held, that upon J.'s death his children were entitled only to the balance of his inheritance, after deduction of his legitimate portion.</i>		<i>The appointment under a will, attested by three or more competent witnesses, of one of such witnesses as executor, is null and void under Act 22 of 1876.</i>	
Human v. Human's Executors ...	160	<i>In re Watson</i>	396
2. — House property — Mortgage authorised for the purpose of executing necessary repairs — <i>Ex parte</i> Dreyer	219	Wills Ordinance—Privileged will—Attestation.	
3. — Landed property—Directions as to sale.		<i>A document by which a father divides his property among his children upon his death is not a privileged testament so as to be exempt from the requirements of the Wills Ordinance, unless it is written by himself.</i>	
<i>Where a testator had directed the landed property in his estate to be sold, and the proceeds divided in certain proportions amongst his heirs, and the heirs (with the exception of one who was absent) both major and minor petitioned the Court for authority to the executors testamentary to pass transfer of the land to them in the like proportions to which they would have been entitled to the proceeds if the land were sold in terms of the will, the Court granted authority to the tutors of the minors qua tutors to purchase the land jointly with the majors at a price to be fixed by the Master.</i>		<i>In re McCalgan</i>	395
<i>The share of the absent heir to be paid into the Master's hands.</i>		WINDING-UP—Insolvency—Call—Proof of debt—Contributory—Account and plan of distribution—Surplus—Confirmation of account—Discharge of insolvent—Personal liability of trustee.	
<i>Ex parte</i> Pamiana and Others— <i>In re</i> Go Gocene's Estate	173	<i>The liquidators of a company wound up under the Winding-up Act of 1868 may place upon the list of contributories the name of a trustee of an insolvent shareholder, and a call duly ordered upon such contributory amounts to a judgment which may be proved against the insolvent estate.</i>	
4. — Landed property—Heirs—Compromise—Confirmation by Court— <i>In re</i> Schoeman's Estate... ..	224	<i>The insolvent is not entitled to receive any surplus awarded to him by the plan of distribution until he has received his discharge, and in the meantime it is competent for the creditors to prove their claims subject to the provisions of the 37th section of the Insolvent Ordinance.</i>	
		<i>An account and plan of distribution awarding such surplus to the in-</i>	

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<i>solvent having been confirmed by the Court, and no proof of debt having been filed by the liquidators, the trustee in good faith and in the belief that the company, which had not then been ordered to be wound up, was a sound concern, paid a portion of such a surplus to the insolvent.</i>	
<i>Held, that the trustee was not personally liable, at the suit of the liquidators, to refund the amount so paid.</i>	
<i>Distinction between trustees and executors not providing for any continuing liability of estates respectively administered by them explained.</i>	
Liquidators of Union Bank v. King's Trustee	89
WINDING-UP ACT OF 1868, SECTION 47—Companies' Act, 1892, sections 209 and 149—Directors—Breach of trust—Liquidators.	
<i>At a meeting of shareholders of a company for the administration of the estates of deceased persons and other trust estates it was resolved that the company be voluntarily wound up, and two of the directors were appointed liquidators.</i>	
<i>A shareholder, who was not represented at the meeting, now applied for a compulsory winding-up on the ground that the two liquidators had, with the other directors, been guilty of a breach of trust in speculating in gold-mining shares with the assets of the company and would not be fit and proper persons to thoroughly investigate the affairs of the company.</i>	
<i>Held, that, inasmuch as the trust deed did not authorise the directors to speculate in gold shares, and the liquidators had not satisfied the Court that they voted in the minority when the speculations were entered into, the order for a compulsory winding-up ought to be made in order that independent liquidators might be appointed by the Court.</i>	
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